[fol. 1]

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 19520

W. R. Grace & Co., Petitioner,

vs.

Civil Aeronautics Board, Pan American Airways Corporation, Pan American Airways, Inc., Eastern Air Lines, Inc., National Airlines, Inc., Chicago and Southern Air Lines, Inc., Taca, S. A., Department of Justice of the United States of America, and Pan American-Grace Airways, Inc., Respondents.

Notice of Motion to Dismiss or to Affirm Forthwith

To: Wright, Gordon, Zachry, Parlin & Cahill, Esqs., Attorneys for Petitioner, 63 Wall Street, New York 5, New York; Root, Clark, Buckner & Ballantine, Esqs., Attorneys for Respondents Pan American Airways Corporation and Pan American Airways, Inc., 31 Nassau Street, New York 5, New York; Gambrell & White, Esqs., Attorneys for Respondent Eastern Air Lines, Inc., Suite 825, The Citizens & Southern National Bank Bldg., Atlanta 3, Georgia; Denning & Cross, Esqs., Attorneys for Respondent National Airlines, Inc., Investment Building, Washington 5, D. C.; H. R. Bolander, Jr., Esq., Attorney for Respondent Chicago and Southern Air Lines, Inc., Municipal Airport, Memphis 2, Tennessee; Willkie, Owen, Otis, Farr & Gallagher, Esqs., Attorneys for Respondent TACA, S. A., 15 Broad Street, New York, New York; W. H. Cogswell, Esq., 7 Hanover Square, New York, New York, and H. Preston Morris, Esq., 135 East 42nd Street, New York, New York, Attorneys for Respondent Pan American-Grace Airways, Inc.

Sirs:

Please take notice that upon the motion of respondent Civil Aeronautics Board affixed hereto, together with the exhibits thereto attached, and upon all the pleadings filed and proceedings hitherto had herein, the undersigned will

move this Court, at a Motion Term thereof, to be held at [fol. 2] the United States Court House, Foley Square, Borough of Manhattan, City of New York, on March 12, 1945, at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order dismissing the petition for review herein, or, in the alternative, for an order affirming forthwith the orders sought to be reviewed thereby, on the grounds stated in the aforesaid motion.

February 1, 1945.

Wendell Berge, Assistant Attorney General, George C. Neal, General Counsel, Civil Aeronautics Board, Attorneys for Respondent, Civil Aeronautics Board.

Of Counsel: Arne C. Wiprud, Lawrence S. Apsey, Edward Dumbauld, Special Assistants to the Attorney General; James A. Tomlinson, Special Attorney, Department of Justice; John H. Wanner, Assistant General Counsel, Civil Aeronautics Board; Louis W. Goodkind, Senior Attorney, Civil Aeronautics Board; Vernon C. Kohlhaas, Associate Attorney, Civil Aeronautics Board.

MOTION OF RESPONDENT CIVIL AERONAUTICS BOARD

Now comes the respondent Civil Aeronautics Board, by its attorneys, Wendell Berge, Assistant Attorney General, and George C. Neal, General Counsel of the Civil Aeronautics Board, and respectfully moves the Court to dismiss the petition for review herein for want of jurisdiction, or, in the alternative, to affirm forthwith the orders of which review is sought by said petition (copies of which orders are annexed hereto as Exhibits A, B and C), upon the grounds that the petitioner, W. R. Grace & Co., has no standing herein to seek review of the said orders and that the said orders are not subject to review, which grounds are more particularly stated as follows:

[fol. 3] A. Petitioner has not disclosed, and cannot disclose, the "substantial interest" in the orders complained of which is required for the filing of a petition for review by section 1006(a) of the Civil Aeronautics Act of 1938, as amended [49 U. S. C. A. 646(a)];

B. No case or controversy is before the Court to which the judicial power extends;

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C. The mandatory type of relief sought, in practical effect, by said petition for review cannot be invoked where, as herein, it is not clear beyond peradventure of doubt that the renunciation of administrative jurisdiction, expressed in the orders sought to be reviewed, was erroneous.

Wherefore, Respondent Civil Aeronautics Board respectfully moves that the petition for review herein be dismissed, or, in the alternative, that the orders of which review is sought be forthwith affirmed, and for such other and further relief as to the Court may seem just and proper.

February 1, 1945.

Wendell Berge, Assistant Attorney General, George C. Neal, General Counsel, Civil Aeronautics Board, Attorneys for Respondent, Civil Aeronautics Board.

Of Counsel: Arne C. Wiprud, Lawrence S. Apsey, Edward Dumbauld, Special Assistants to the Attorney General; James A. Tomlinson, Special Attorney, Department of Justice; John H. Wanner, Assistant General Counsel, Civil Aeronautics Board; Louis W. Goodkind, Senior Attorney, Civil Aeronautics Board; Vernon C. Kohlhaas, Associate Attorney, Civil Aeronautics Board.

[fol. 4]

EXHIBIT A

Orders
Serial Number 2586
Served:

UNITED STATES OF AMERICA, CIVIL AERONAUTICS BOARD

Washington, D. C.

Adopted by the Civil Aeronautics Board at its office in Washington, D. C., on the 17th day of December, 1943

Docket No. 779

In the matter of the alteration, amendment, and modification of the certificate of public convenience and necessity of PAN AMERICAN-GRACE AIRWAYS, INC., under section 401 (h) of the Civil Aeronautics Act of 1938, as amended, to provide for a route terminal in the United States.

ORDER

W. R. Grace and Company, having filed a motion on December 3, 1943, requesting the Board to defer oral argument on and consideration of the motion of Pan American Airways Corporation to dismiss the above-entitled proceeding for want of jurisdiction until the final argument upon the merits, subsequent to the filing of the examiner's report; and

The Board finding, upon due consideration of all matters set forth in the said motion, that W. R. Grace and Company sets forth insufficient grounds for the relief requested:

It Is Ordered That the said motion be and it is denied.

By the Civil Aeronautics Board:

(S.) Fred A. Toombs, Secretary. (Seal.)

[fol. 5]

EXHIBIT B

Orders

Serial No. 2867

UNITED STATES OF AMERICA, CIVIL AERONAUTICS BOARD

Washington, D. C.

At a session of the Civil Aeronautics Board held at its office in Washington, D. C., on the 24th day of May, 1944.

Docket No. 779

In the Matter of the PANAGRA TERMINAL INVESTIGATION under Section 401 of the Civil Aeronautics Act of 1938, as amended.

Order Dismissing Proceeding

The Board, acting upon its own initiative, having instituted an investigation to determine whether the public convenience and necessity require that the certificate of public convenience and necessity of Panagra should be altered, amended and modified to authorize and require that the

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route of Pan American-Grace Airways, Inc., between Buenos Aires, Argentina, and Cristobal, Canal Zone, be extended to a terminal in the United States at Miami, Tampa, or St. Petersburg, Florida; and

The Board, upon motions to dismiss said proceeding for lack of jurisdiction, having issued its opinion containing its findings, conclusions, and decision, which is attached hereto and made a part hereof, and finding its action in this matter is necessary pursuant to said opinion;

It is ordered, That the proceeding instituted by the Board by its order of September 10, 1942 (Order Serial No. 1928), as amended by its order of October 22, 1942 (Order Serial No. 1991) be, and the same is dismissed.

By the Civil Aeronautics Board:

(S.) Fred A. Toombs.

Fred A. Toombs, Secretary. (Seal.)

[fol. 5-1] 2867

Served:

UNITED STATES OF AMERICA, CIVIL AERONAUTICS BOARD,

Washington, D. C.

Docket No. 779

PANAGRA TERMINAL INVESTIGATION

Decided: May 24, 1944

Section 401(h) of the Act authorizes the Board, on its own initiative, to alter, amend, or modify a certificate of public convenience and necessity by including therein new terminal and intermediate points; but that authority does not permit the addition of new service which would be so extensive as to amount to a new air transportation route, or of such a kind as to substantially change the character of a carrier's system.

The extension of the route of Panagra to a terminal point in Florida would constitute a basic transformation in the

character of that carrier's system and, therefore, cannot be ordered by the Board under section 401(h) of the Act.

Proceedings dismissed.

Appearances: John T. Cahill and Fred J. Knauer for W. R. Grace & Co. Henry J. Friendly and J. P. Kranz, Jr. for Pan American Airways Corporation. E. Smythe Gambrell and W. Glen Harlan for Eastern Air Lines, Inc. William I. Denning and Coates Lear for National Airlines, Inc. H. R. Bolander, Jr. for Chicago and Southern Air Lines, Inc. John H. Wanner, H. Don Reynolds, and Melvin S. Cohen for the Civil Aeronautics Board.

[fol. 5-2] Opinion

By the Board: This proceeding comes before us at this time on a motion to dismiss which challenges the Board's jurisdiction.

Before proceeding to a determination of the principal issue presented to the Board at the present stage of this case, it is necessary to review briefly the circumstances which gave rise to the proceeding. Pan American-Grace Airways, Inc., hereinafter referred to as Panagra, was incorporated in 1929 by its present co-owners Pan American Airways Corporation and W. R. Grace & Co., hereinafter referred to as Grace, each of which purchased, and has at all times since then owned, 50 per cent of Panagra's outstanding capital stock. Shortly after its incorporation, Panagra secured a mail contract with the Postmaster General for the transportation of mail between the Canal Zone and Buenos Aires, Argentina, via various points on the west coast of South America. Operations under the contract were commenced on May 17, 1929, between the Canal Zone and Mollendo, Peru, and were extended to Buenos Aires on or about October 12, 1929. Since that date, Panagra has transported persons, property, and mail on its entire route between the Canal Zone and Buenos Aires. From time to time additional points and local services have been added to the route, so that at the present time its system comprises approximately 8,800 route miles.

Pan American Airways, Inc., a wholly-owned subsidiary of Pan American Airways Corporation, has operated international air transportation services since 1927. Since November 1931, it has operated an air transportation service

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between Miami, Florida, and Buenos Aires by way of points in the Caribbean and on the east coast of South America. In addition to that service, and others, Pan American Airways, Inc., has operated services between Miami and the Canal Zone and between Brownsville, Texas, and the Canal Zone, making connections at the Canal Zone with the services of Panagra.

The route between Miami and Buenos Aires via the Canal Zone and Panagra's west coast route is shorter than the route of Pan American Airways, Inc., between Miami and Buenos Aires via east coast points and the so-called Brazilian cut-off. At no time has Panagra operated regular air transportation service north of the Canal Zone. Although traffic between the United States and points on the west coast of South America and Buenos Aires constitutes a large and important share of Panagra's total business, this traffic has been carried between the United States and the Canal Zone by other carriers, largely by Pan American Airways, Inc., and at that point delivered to or received from Panagra for onward transportation. Most of the business interchanged by Pan American and Panagra at the Canal Zone is carried over Pan American's Miami-Canal Zone route, and originates in or is destined to the eastern seaboard of the United States. Other important contributions to Panagra's traffic flow are made to or from the Canal Zone through the Brownsville gateway, and through [fol. 5-3] the Los Angeles gateway served by Pan American's subsidiary Compania Mexicana, S. A. Some traffic originating on or destined for the north coast of South America is also interchanged with Panagra at the Canal Zone. In addition, Pan American Airways, Inc., has recently been authorized to serve New Orleans, and its New Orleans-Canal Zone service via Central America will enable traffic to be interchanged with Panagra at the Canal Zone.

The New Orleans-Canal Zone route was granted to Pan American by the Board on February 26, 1943, for a three year period.[1] The record in the present proceedings shows that prior to the hearings in the New Orleans case the Grace representatives on the Board of Directors of Panagra urged that Panagra should apply for a route between the Canal

[1] Pan American Airways, Inc., et al.—Service from New Orleans to Cuba and Central America, 4 C. A. B. , decided February 26, 1943.

Zone and New Orleans. This proposal was not acceptable to the Pan American representatives on the Panagra Board. Since Pan American and Grace held equal stock ownership and representation on the Panagra Board, the proposal of the Grace representatives failed for lack of a majority.

When efforts to secure the filing of an application by Panagra failed, Grace filed, on May 3, 1941, a petition for leave to intervene in the New Orleans case alleging that since Panagra was not filing an application Grace proposed to file an application in its own behalf for a certificate for a route between the United States and the Canal Zone. Grace was granted leave to intervene, but did not file an application for a certificate during the time that case was pending.

On December 16, 1941, Grace filed a petition and complaint, Docket No. 707, requesting the Board to institute a proceeding pursuant to section 401 (h) of the Act to alter, amend, and modify Panagra's certificate of public convenience and necessity so as to make the northern terminal of its route a point in the United States such as Miami or Tampa, Florida, or New Orleans, Louisiana. On April 29, 1942, Grace filed a second complaint, Docket No. 744, requesting the Board to require Pan American Airways Corporation, pursuant to section 411 of the Act and sections 7 and 11 of the Clayton Act, to cease and desist from certain matters alleged by Grace to be in violation of those sections, and to divest itself of its ownership of the stock of Panagra to the extent necessary to divest itself of its present negative control of Panagra; and also renewing its request in Docket No. 707.

No formal steps were taken by the Board in connection with the Grace petitions in Dockets Nos. 707 and 744 until September 1942. During this period all action in the New Orleans case also was postponed under the Board's policy, announced December 12, 1941, of suspending further action [fol. 5-4] in all proceedings pending before it under sections 401 (d) and 401 (h) of the Act "in order that the immediate and maximum attention of air carriers and their personnel, and that of the Civil Aeronautics Board, as well as other Government agencies concerned, may be available for the most efficient discharge of the emergency demands" arising out of the war.

However, the Board did explore the possibility of working out a voluntary settlement of the controversy between

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Pan American and Grace. Numerous conferences were held by the Board with both parties. Finally, the Board suggested that the parties enter into an agreement under which sufficient shares of the two stockholders would be transferred to an independent public voting trustee or trustees to permit the election to the Panagra Board of an independent director or directors, or under which such an independent public director or directors might be otherwise appointed, who would be able to break the deadlock resulting from the equal division of the ownership of Panagra stock between Pan American and Grace. After it became apparent that no satisfactory voluntary arrangement could be mutually agreed upon by the parties and that all efforts to mediate the differences between them would be unsuccessful, the Board, on September 10, 1942, issued its order (Serial No. 1928),[2] as amended by its order of October 22, 1942 (Serial No. 1991)[3] instituting the present proceeding.

The proceeding was instituted by the Board pursuant to section 401(h) of the Act, which provides in part as follows:

> "(h) The Authority, upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify, or suspend any such certificate

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[2] "A proceeding is hereby instituted by the Board to determine whether the public convenience and necessity require that the certificate of public convenience and necessity of Panagra should be altered, amended, and modified to authorize and require (a) that Panagra's route terminate in the United States at Miami or Tampa, Florida; New Orleans, Louisiana; Brownsville or El Paso, Texas; Los Angeles, California; or at two or more of said points; and (b) in the event a terminal or terminals in the United States are authorized and required pursuant to this proceeding, that Panagra serve one or more intermediate points between the Canal Zone and said terminal or terminals in the United States."

[3] "Paragraph 1 (a) of the aforesaid order of the Board dated September 10, 1942 (Order Serial No. 1928) be and it is amended by striking out the words 'Miami or Tampa, Florida; New Orleans, Louisiana; Brownsville or El Paso, Texas; Los Angeles, California', and inserting in lieu thereof the words 'Miami, Tampa, or St. Petersburg, Florida.'"

[of public convenience and necessity], in whole or in part, if the public convenience and necessity so require, * * *."

[fol. 5-5] The orders provide that it is the purpose of the proceeding to determine whether the public convenience and necessity require that the certificate of public convenience and necessity of Panagra should be altered, amended, and modified to authorize and require that Panagra's route between Buenos Aires, Argentina, and Cristobal, Canal Zone, be extended to a terminal in the United States at Miami, Tampa, or St. Petersburg, Florida. Grace, Pan American Airways, Inc., and Panagra, were made parties to the proceeding, and subsequently the Department of Justice, Pan American Airways Corporation, National Airlines, Inc., TACA, S. A., Eastern Air Lines, Inc., and Chicago and Southern Air Lines, Inc., were granted permission to intervene.

Hearings in the proceeding began on September 15, 1943. On the same day Pan American Airways Corporation filed with the Board a motion to dismiss the proceeding for want of jurisdiction, which was denied by the Board on September 23, 1943, without prejudice to its renewal at the close of the hearing. Hearings were then completed and Pan American renewed its motion, in which it was joined by Eastern Air Lines and National Airlines. Briefs in support of, and in opposition to, the motion were submitted on January 15, 1944, and oral argument on the motion was heard by the Board on January 31, 1944.

The motion to dismiss asserts that the Board is without power, under the provisions of the Act, to order an extension of Panagra's route from the Canal Zone to Florida. It is contended that section 401 (h) does not grant the Board power to extend the route of an air carrier and, in the alternative, that even though such power is granted, the Board cannot compel the carrier to extend its lines into a territory not previously served by that carrier.

The question presented to us by the motion is one of statutory construction; namely, does the power of the Board under section 401 (m) to "alter," "amend," and "modify" a certificate of public convenience and necessity include the power to compel, in the absence of an application from the carrier, a route extension of the character involved in the case before us. If the statute does not authorize such an

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extension, the proceeding must be dismissed; if it does, the motion to dismiss must be denied.

We are of the opinion that this section of the Act does authorize the Board to add new points or services to the certificate of a carrier on the Board's own initiative and without an application by, and the consent of, the carrier; but this authority does not include the addition of new service which would be so extensive as to amount to a new air transportation route, or of such a kind as to substantially change the character of a carrier's system.

Section 401(a) of the Act is the keystone of the Act's regulatory plan with respect to the extent of the operations of air carriers. It provides that "no air carrier shall en- [fol. 5-6] gage in any air transportation unless there is in force a certificate issued by the Authority [Board] authorizing such air carrier to engage in such air transportation." Section 401 (f) requires that "Each certificate • • • shall specify the terminal and intermediate points, if any, between which the air carrier is authorized to engage in air transportation" and in the case of a certificate for foreign air transportation provides that a certificate need "designate only the general route or routes to be followed" if the designation of terminal and intermediate points is not practicable.

The fundamental regulatory purpose which certificates of public convenience and necessity serve is to prescribe, and thereby to control, the extent of the air transportation which each particular carrier may carry on. The principal components of a certificate are the terminal and intermediate points and the classes of traffic to be served and, in view of the purposes of the certificate procedure, it is clear that any other terms of a certificate are simply incidental to these major elements. Under these circumstances, the conclusion is inescapable that when section 401 (h) provides that the Board "may alter, amend, [or] modify, • • • any such certificate" it constitutes a grant of power to alter, amend, or modify that which is the significant part of a certificate and which is the basis for the operation of the certificate scheme as a regulatory device, namely, the terminal and intermediate points and classes of traffic authorized to be served. There is nothing in the usual and ordinary meaning of the words of the statutory phrase "may alter, amend, [or] modify any such certificate," which requires, or even justifies a contrary conclusion.

It has been argued that other Federal statutes in the railroad, motor carrier, natural gas, communications and electric power fields show a congressional intent to grant to Federal regulatory agencies a circumscribed and carefully delineated power to compel extensions of public utility services, and that, in the absence of similar language in the Civil Aeronautics Act spelling out the precise power of the Board to compel extensions of airline service, the power granted by section 401 (h) is extremely limited in scope. In our opinion, however, an examination of these statutes reveals that they differ so greatly from the Civil Aeronautics Act in language and purpose, and in the factual situations to which they relate, that their relation to the problem before us is too remote to be significant.

Consideration of the legislative history of the Act is of no assistance in resolving the question. Such material as the parties have presented as significant seems about equally susceptible of being construed as supporting or as denying the existence of the power of extension. It is pointed out, for example, that in several of the aviation bills which were introduced in Congress prior to the final enactment of the Civil Aeronautics Act, provisions were included, in addition to a section similar to the present section 401 (h), which stated that the Board should have power to require an "extension of service." It is argued from this that since such a provision was dropped from [fol. 5-7] the legislation as finally enacted it is indicated that Congress did not intend the Board to have the power to order compulsory extensions of a carrier's route. On the other hand, those opposing the motion in this proceeding take the position that the eventual omission from the Act of this provision of the earlier bills indicates that Congress believed the provision to be unnecessary since section 401 (h) already provided for such a power. The legislative background appears to us to be entirely inconclusive on the point.

References to other provisions of the Act shed little light on the problem. It has been argued in support of the motion that the omission from section 401(h) of the phrase, which appears in section 401(d), that the Board must find a carrier "fit, willing, and able" indicates that an extension of service cannot be authorized under the former section; and that since section 404, providing that "It shall be the duty of every air carrier to provide and furnish interstate

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and overseas air transportation, as authorized by its certificate * * *," does not apply to foreign air transportation, section 401(h) must be construed as not authorizing the Board to compel an extension of service since the Act gives the Board no power to order the rendering of the new service.

Opponents of the motion, on the other hand, contend that the omission of the words "fit, willing, and able" from section 401(h) shows that the power of the Board requiring extensions of service under section 401(h) may be exercised even though the carrier is not "willing" to render the service. It is contended also that the inapplicability of section 404 to foreign air transportation is not material in view of the fact that section 401(k) provides that "no air carrier shall abandon any route, or part thereof, for which a certificate has been issued" unless the Board approves the abandonment—although it is arguable that section 401(g), which provides that the Board shall suspend or revoke a certificate if the service authorized thereby is not inaugurated within 90 days, prescribes the exclusive method of handling a carrier's failure to start a newly authorized service. Parties opposing the motion cite the language of section 401(n) as indicating that the Board's power in section 401(h) to amend a certificate includes the power to provide for additional services. That section, after providing for the certification to the Board by the Postmaster General of the need for additional mail service, states that the Board shall, where required by the public convenience and necessity, "make provision for such additional service * * * by amending an existing certificate or certificates." This point is countered by the argument that the section does not refer to compulsory extensions of service and consequently is of no aid in determining whether section 401(h) provides for compulsion. As in the case of the legislative history, we find no clear indication in the other provisions of the Act as to the Congressional intent concerning the meaning of section 401(h). The provisions of the Act in that respect are inharmonious and any conclusion drawn therefrom must rest at best on a delicate foundation of an extremely involved process of reasoning in order to reconcile the various provisions.

[fol. 5-8] Under such circumstances, the sound approach to the question of statutory construction presented here is to rely upon the usual and ordinary meaning of the statu-

tory language as fully expressing the intent of Congress; by applying that meaning to the language of section 401(h), we find in the section a grant of power to the Board to compel extensions of service. It remains to be determined whether there are limits upon the character or size of the extensions which can be required.

Although the power to alter, amend, and modify certificates of public convenience grants a broad and important power to the Board, it is apparent that the words alter, amend, and modify connote a limited power to change an existing certificate. The power to alter, amend, and modify does not include the power to transform the essential character of the thing being altered, amended, or modified. Thus it was held in *Smith* v. *United States*, 74 F. (2d) 941, 942 (C. C. A. 5th, 1935) that power to alter means power "to change without destroying the identity of the thing changed." In *Interstate Commerce Commission* v. *Oregon-Washington R. R. & Navigation Co.*, 288 U. S. 14 (1933) the Supreme Court held (Justices Cardoza, Stone and Brandeis dissenting) that paragraph (21) of section 1 of the Interstate Commerce Act did not authorize the Interstate Commerce Commission to compel the particular extension of the lines of a railroad presented to the court in that case. The significant point for present purpose, however, is that even the dissenting Justices, who took the position that the extension under consideration was lawful, conceded that the word "extension" used in the statute being construed did not authorize unlimited additions of new services.

While we must find, therefore, that there are limits to the scope of the grant of power in section 401(h), the generality of the statutory language makes it impossible to draw any precise line of demarcation between what is permitted and what is not.

It has been argued that by reason of constitutional limitations section 401(h) must be construed as giving the Board power to compel only those extensions of service which are within the scope of the undertaking of a carrier. Decisions by State and Federal Courts are cited as supporting this view and it is asserted that this principle must have been known to Congress and incorporated by it in the provisions of the Civil Aeronautics Act. While it is true that in a number of opinions the courts have recited as a rule of Constitutional law the principle that a utility cannot be

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compelled to extend its service into territories which it has not undertaken to serve,[4] the courts have not given express [fol. 5-9] recognition to the existence of that principle in all cases. There are cases in which orders compelling extensions of service seem to have been held to be valid simply on a finding by the courts that the order was reasonable.[5] The contrast between the two different expressions of principle involved is brought out forcibly in *Interstate Commerce Commission* v. *Oregon-Washington R. R. & Navigation Co., supra.* While the decision in that case turned upon a question of statutory construction, the majority of the court indicated clearly that it felt that the Constitution would not permit an extension beyond the profession of service of the carrier.

On the other hand, the dissenting opinion expresses the view that:

> "As long as governmental orders are kept within the range of reason, their operation is unaffected by expectation or desire.
>
> "The Fifth Amendment of the Constitution is invoked by the carriers but invoked without avail. Consisently with that Amendment Congress may delegate to the Commission the power to force upon unwilling carriers an extension of their lines into fields of old service and of new. Much of what has been written in this opinion as to the meaning of the statute is pertinent also to an inquiry as to power. Again the

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[4] *Interstate Commerce Commission* v. *Oregon-Washington R. Nav. Co.*, 288 U. S. 14, 77 L. Ed. 588, 53 53 Sup. Ct. 266 (1933); *Atchison, T. & S. F. R. Co.* v. *Railroad Commission*, 173 Cal. 577, 160 Pac. 828 (1916); *Hollywood Chamber of Commerce* v. *Railroad Commission*, 192 Cal. 307, 219 Pac. 983 (1923); *Oklahoma Natural Gas Co.* v. *Corporation Commission*, 88 Okla. 51, 211 Pac. 401 (1922); *Southern Bell Tel. & Tel. Co.* v. *Town of Calhoun*, 287 Fed. 381 (W. D. S. C., 1923).

[5] *New York ex rel. Woodhaven Gas Light Co.* v. *Public Utilities Commission*, 269 U. S. 244, 70 L. Ed. 255, 46 Sup. Ct. 83, (1925); *New York ex rel. New York & Q. G. Co.* v. *McCall*, 245 U. S. 345, 62 L. Ed. 337 (1917); *International Bridge Co.* v. *New York*, 254 U. S. 126, 65 L. Ed. 176 (1920).

> thought is to be kept before us that the need of the public, not the acquiescence of the carrier, is the measure of the service, provided only that for such service there is adequate requital. Whether such requital has been assured is a question not susceptible of answer except in the setting of the circumstances."

We cannot find that the so-called profession of service rule is a sound limitation on the power of extension. A public utility professes to serve in fact only that which it is serving at the time, or in the case of an air carrier only the terminal and intermediate points and classes of traffic currently covered by its certificate. It seems to us, therefore, that the rule is meaningless as a test of the validity of an order compelling the inauguration of a new service; and to give lip-service to the principle would not be consistent with intelligent administration of the Act. Modern concepts of the scope of governmental regulatory power support the soundness of the conclusion of the dissenting Justices in the *Interstate Commerce Commission* v. *Oregon-Washington R. & Navigation Co.* case that the constitutional validity of governmental orders is to be tested by the standard of reasonableness.[6]

[fol. 5-10] While in our opinion neither the Constitution nor the principles of statutory construction restrict the power of the Board under section 401(h) to ordering compulsory extensions which are within the undertaking of the air carrier, nevertheless, as we have pointed out earlier, the controlling statutory words are not unlimited in meaning. We believe that the fair construction of the scope of the terms "alter," "amend," or "modify" can be best expressed in the language used by the dissenting opinion in the Oregon case to define the term "extension":

> "• • • [They do] not fairly connote a prolongation so vast and sudden as to work an utter transformation of the character of the road, making what was extended the incident and the extension the principal. The action of the Commission must have a basis in reason, and its order must be viewed with reference to the length and other conditions of the line or lines to be enlarged. No doubt there is a point at which

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[6] Nebbia v. New York, 291 U. S. 502, 78 L. Ed. 940 (1934).

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the enlargement of a road becomes 'the construction of a new line' rather than the extension of an old one."

It is on the basis of these principles that we now turn to the consideration of the extension of Panagra's system to a terminal point in the United States.

Since its incorporation in 1929 Panagra's commercial operations at all times have been confined to the transportation of passengers, cargo, and mail between the Canal Zone and points in South America. While a large proportion of its total traffic has consisted of traffic flowing between the United States and South America, that traffic has been moved north of the Canal Zone by other carriers. The extension of Panagra's system referred to in the order instituting the present proceeding would give the carrier direct access to one or more of the major gateways for through traffic between the United States and Latin America. The extension would permit it to connect directly with the domestic air transportation system of the United States, without the necessity of relying upon the connecting services of Pan American and other carriers operating in the foreign field for access to traffic flowing to and from the continental United States. The extension would increase the route mileage of Panagra approximately 1,200 miles, or about 14 per cent of its existing mileage. It is estimated that the extension initially would require an additional capital investment on the part of Panagra of around $800,000 which compares with Pamagra's gross assets at the end of 1942 of $10,700,000 and its net worth, exclusive of goodwill, of over $3,000,000.

In the light of the conditions surrounding the extension here involved we conclude that the requiring of the extension would not be within the power granted the Board by section 401(h) to "alter, amend, [or] modify" Panagra's certificate. The length of the mileage of the new service and the amount of additional investment required to operate it have been factors in reaching this conclusion. However, the principal consideration which influences us is the fact that to extend the Panagra system from the Canal Zone [fol. 5-11] to a point in Florida would constitute a basic transformation of the character of the carrier. Panagra, now a connecting carrier as to through traffic between the United States and South America, would be made a carrier

directly serving that traffic—and serving it moreover in competition with an affiliated company. There is a fundamental difference between the position of a carrier whose routes stop so far short of the continental United States as those of Panagra and which depends upon connecting carriers for access to traffic to and from that area, and a carrier which has direct access to the continental United States over its own system. It does not seem reasonable to believe that Congress contemplated that such a change in the character of a carrier's system should be compelled by Government order. We find, therefore, that the extension of Panagra's route from the Canal Zone to the United States would not be an alteration, amendment, or modification of its certificate within the meaning of section 401(h) of the Act in the sense that the Board could compel such an extension in the absence of an application from Panagra.

Regardless of which of the co-owners of Panagra is at fault, the very fact that a controversy of this kind has developed indicates that an unhealthy condition exists in the internal affairs of the company. A decision by the Board, after consideration on the merits, of the question of whether or not Panagra's routes should be extended to some point or points in the continental limits of the United States would remedy one particular controversy between the co-owners; but it would not solve the basic difficulties of the Panagra joint ownership.

This is an inherently bad situation. Deadlock between the two interests equally represented in the ownership of the company is always possible, and certain to occur from time to time, especially in view of the special interests and the other activities of the two co-owners. We have sought remedy under the Civil Aeronautics Act, but after having the facts presented in extensive public hearings we must conclude that the Act does not give the Board the power to take the action contemplated by this proceeding.

An appropriate order will be entered dismissing the proceeding.

Pogue, Chairman, Warner, Ryan and Lee, Members of the Board, concurred in the above opinion. Branch, Member, did not take part in the decision.

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[fol. 6] EXHIBIT C

UNITED STATES OF AMERICA, CIVIL AERONAUTICS BOARD

Washington, D. C.

Adopted by the Civil Aeronautics Board at its office in Washington, D. C. on the 5th day of August, 1944.

Docket No. 779

In the matter of the alteration, amendment and modification of the certificate of public convenience and necessity of PAN AMERICAN-GRACE AIRWAYS, INC. under section 401(h) of the Civil Aeronautics Act of 1938, as amended, to provide for a route terminal in the United States.

Order Denying Petition

W. R. Grace & Co. having filed a petition for reargument and reconsideration of the Board's opinion and order Serial Number 2867 dated May 24, 1944, granting the motion of Pan American Airways Corporation to dismiss the above-entitled proceeding for lack of jurisdiction; and

The Board, upon due consideration of all the matters set forth in said petition, finding that the grounds set forth therein are insufficient to justify granting the relief requested;

It is ordered, That said petition of W. R. Grace & Co. be and it is denied.

By the Civil Aeronautics Board: (S.) Fred A. Toombs, Fred A. Toombs, Secretary. (Seal)

[fol. 7] [Endorsed:] No. 19250. In the United States Circuit Court of Appeals for the Second Circuit W. R. Grace & Co., Petitioner, v. Civil Aeronautics Board, Pan American Airways Corporation, Pan American Airways, Inc., Eastern Air Lines, Inc., National Airlines, Inc., Chicago and Southern Air Lines, Inc., Taca, S. A., Department of Justice of the United States of America, and Pan American-Grace Airways, Inc., Respondents. Notice of Motion to Dismiss or to Affirm Forthwith. Civil Aeronautics Board, Washington 25, D. C.

[fol. 8] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 19520

W. R. GRACE & Co., Petitioner,

v.

CIVIL AERONAUTICS BOARD, PAN AMERICAN AIRWAYS CORPORATION, PAN AMERICAN AIRWAYS, INC., EASTERN AIR LINES, INC., NATIONAL AIRLINES, INC., CHICAGO and SOUTHERN AIR LINES, INC., TACA, S. A., DEPARTMENT OF JUSTICE OF THE UNITED STATES OF AMERICA, and PAN AMERICAN-GRACE AIRWAYS, INC., Respondents.

NOTICE OF JOINDER IN SUPPORT OF MOTION TO DISMISS OR TO AFFIRM

To: Wright, Gordon, Zachry, Parlin & Cahill, Esqs., Attorneys for W. R. Grace & Co., Petitioner, 63 Wall Street, New York 5, New York; Gambell & White, Esqs., Attorneys for Respondent Eastern Air Lines, Inc., Suit 825, The Citizens & Southern National Bank Building, Atlanta 3, Georgia; Denning & Cross, Esqs., Attorneys for Respondent National Airlines, Inc., Investment Building, Washington 5, D. C.; H. R. Bolander, Jr., Esq., Attorney for Respondent Chicago and Southern Air Lines, Inc., Municipal Airport, Memphis 2, Tennessee; Willkie, Owen, Otis, Farr & Gallagher, Esqs., Attorneys for Respondent Taca, S. A., 15 Broad Street, New York; W. F. Cogswell, Esq., 7 Hanover Square, New New York 5, New York; W. F. Cogswell, Esq., 7 Hanover Square, New York 5, New York; and H. Preston Morris, Esq., 135 East 42nd Street, New York 17, New York, Attorneys for Respondent Pan American-Grace Airways, Inc.; Wendell Berge, Esq., Assistant Attorney General, Depart-
[fol. 9] ment of Justice, Washington, D. C.; George C. Neal, Esq., General Counsel, Civil Aeronautics Board, Washington, D.C.

Sirs:

Please take notice that upon the motion of respondent Civil Aeronautics Board, filed February 1, 1945, and upon all the pleadings filed and proceedings hitherto had herein, the undersigned, as attorneys for respondent Pan American Airways Corporation, will join in support of the aforesaid

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motion of respondent, Civil Aeronautics Board, at a Motion Term of this Court, to be held at the United States Court House, Foley Square, Borough of Manhattan, City of New York, on March 12, 1945, at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order dismissing the petition for review herein, or in the alternative, for an order affirming forthwith the orders sought to be reviewed thereby, on the grounds stated in the aforesaid motion.

February 8, 1945.

Root, Clark, Buckner & Ballantine, Attorneys for Pan American Airways Corporation, 31 Nassau Street, New York 5, N. Y.

Henry J. Friendly, Counsel.

[fol. 10] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 19520

W. R. GRACE & Co., Petitioner,

vs.

CIVIL AERONAUTICS BOARD, PAN AMERICAN AIRWAYS CORPORATION, Pan American Airways, Inc., Eastern Air Lines, Inc., National Airlines, Inc., Chicago and Southern Air Lines, Inc., TACA, S. A., Department of Justice of the United States of America, and Pan American-Grace Airways, Inc., Respondents.

STATE OF NEW YORK,
County of New York, ss:

Frederick Goldfeder, being duly sworn, deposes and says:

I am over the age of 21 and a clerk in the office of Root, Clark, Buckner & Ballantine, attorneys for Pan American Airways Corporation herein. On the 10th day of February, 1945, I served the annexed notice of joinder on the attorneys whose names are listed below by depositing true copies thereof securely enclosed in postpaid envelopes in a post office box located at 31 Nassau Street, City, County and

State of New York and directed to said attorneys at the addresses listed below their names:

Wright, Gordon, Zachry, Parlin & Cahill, Esqs., 63 Wall Street, New York 5, New York; Gambrell & White, Esqs., Suite 825, The Citizens & Southern National Bank Build-
[fol. 11] ing, Atlanta 3, Georgia; Denning & Cross, Esqs., Investment Building, Washington 5, D. C.; H. R. Bolander, Jr., Esq., Municipal Airport, Memphis 2, Tennessee; Willkie, Owen, Otis, Farr & Gallagher, Esqs., 15 Broad Street, New York 5, New York; W. F. Cogswell, Esq., 7 Hanover Square, New York 5, New York; H. Preston Morris, Esq., 135 East 42nd Street, New York 17, New York; Wendell Berge, Esq., Assistant Attorney General, Department of Justice, Washington, D. C.

Frederick Goldfeder.

Sworn to before me this 13th day of February, 1945.

Norman R. Caridi, Notary Public, Kings County. Kings Co. Clk's. No. 404, Reg. No. 74C5, N. Y. Co. Clk's. No. 329, Reg. No. 186C5. Commission Expires March 30, 1945.

[fol. 12] [Endorsed:] In the United States Circuit Court of Appeals for the Second Circuit. W. R. Grace & Co., Petitioner, v. Civil Aeronautics Board, et als., Respondents. Notice of Joinder in Support of Motion to Dismiss or to Affirm. Root, Clark, Buckner & Ballantine, Attorneys for Pan American Airways Corporation, 31 Nassau Street, Borough of Manhattan, New York City.

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[fol. 13] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 4th day of June, one thousand nine hundred and forty-five.

Present: Hon. Learned Hand, Hon. Augustus N. Hand, Hon. Jerome N. Frank, Circuit Judges

W. R. GRACE & Co., Petitioner,

vs.

CIVIL AERONAUTICS BOARD, et al., Respondents

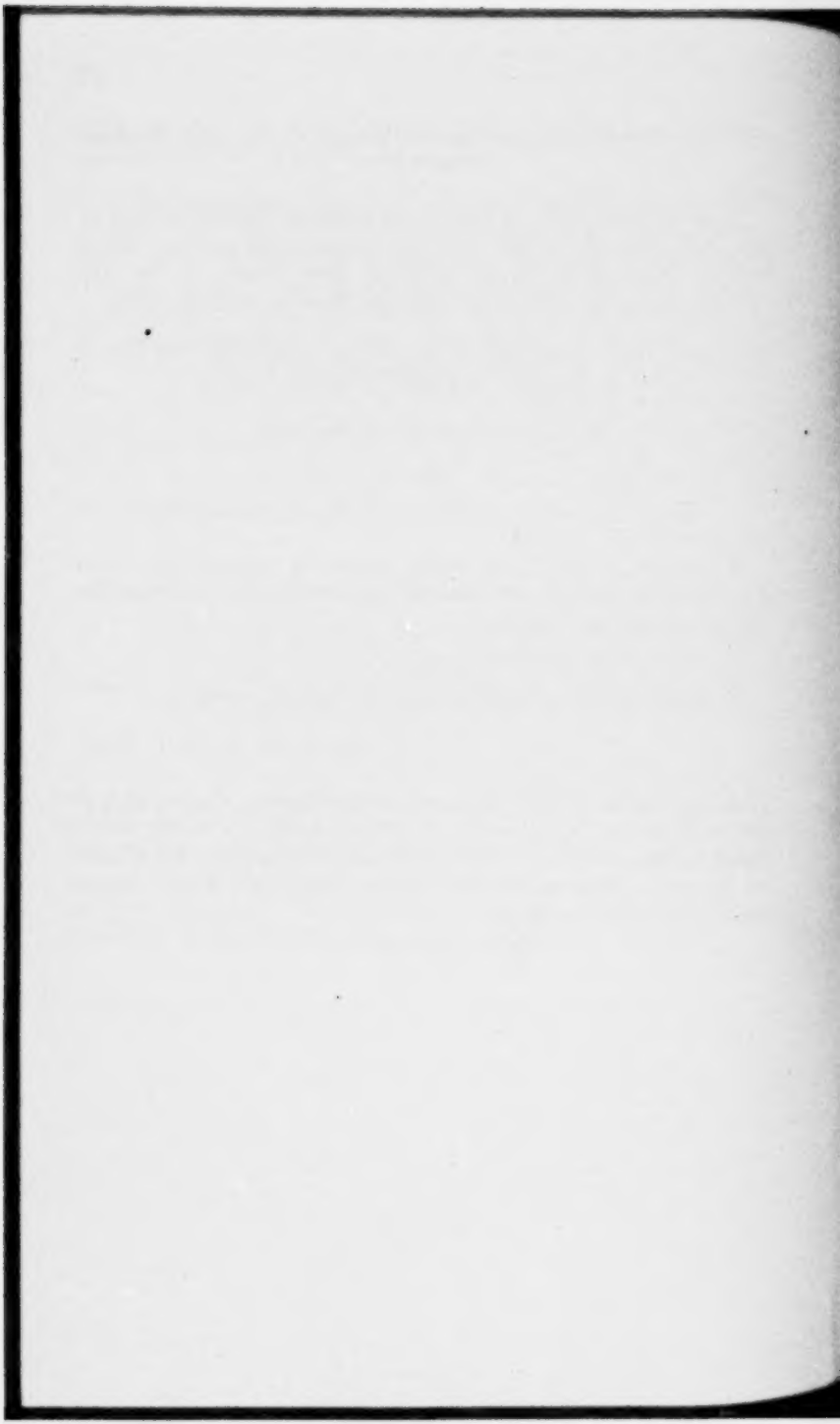
A motion having been made herein by counsel for Civil Aeronautics Board, respondent, to dismiss the petition for review or affirm forthwith,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is denied.

Alexander M. Bell, Clerk.

[fol. 14] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. W. R. Grace & Co., v. Civil Aeronautics Board, et al. Order. United States Circuit Court of Appeals: Second Circuit. Filed June 4th, 1945. Alexander M. Bell, Clerk.



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IN THE

United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

W. R. GRACE & Co.,
Petitioner,

against

CIVIL AERONAUTICS BOARD, PAN AMERICAN AIRWAYS CORPORATION, PAN AMERICAN AIRWAYS, INC., EASTERN AIR LINES, INC., NATIONAL AIRLINES, INC., CHICAGO & SOUTHERN AIR LINES, INC., TACA, S. A., DEPARTMENT OF JUSTICE OF THE UNITED STATES OF AMERICA and PAN AMERICAN-GRACE AIRWAYS, INC.,
Respondents.

Statement Under Rule 13(4).

By petition and complaint dated December 16, 1941, W. R. Grace & Co. requested the Civil Aeronautics Board to institute a proceeding, pursuant to Section 401(h) of the Civil Aeronautics Act of 1938, to alter, amend and modify the Certificate of Public Convenience and Necessity of Pan American-Grace Airways Inc. so as to make the northern terminal of its route a point in the United States. This was subsequently assigned the Docket No. 707.

By complaint dated April 29, 1942, W. R. Grace & Co. requested the Board to require Pan American Airways Corporation, pursuant to Section 411 of the Civil Aeronautics Act and Sections 7 and 11 of the Clayton Act, to cease and desist from certain matters in violation of those sections and to divest itself of its ownership of the stock of Pan Ameri-

can-Grace Airways Inc. to the extent necessary to remove its negative control thereof. This was assigned the Docket No. 744.

By order dated September 10, 1942 the Board on its own initiative instituted a proceeding to determine whether the Certificate of Public Convenience and Necessity of Pan American-Grace Airways Inc. should be altered, amended, and modified to authorize and require that the northern terminal of its route be in the United States. This proceeding was given the Docket No. 779. W. R. Grace & Co., Pan American Airways Inc., and Pan American-Grace Airways Inc. were made parties to the proceeding. Subsequently, the Department of Justice, Pan American Airways Corporation, National Airlines Inc., TACA, S.A., Eastern Air Lines Inc. and Chicago and Southern Air Lines Inc. were granted permission to intervene.

By an order dated October 22, 1942, the Board limited the scope of Docket 779 to the consideration of Miami, Tampa and St. Petersburg, Florida as United States terminals for Pan American-Grace Airways Inc.

On October 26, 1942, Pan American Airways Corporation filed in Docket 779 an answer and petition for investigation under Section 415 of the Civil Aeronautics Act.

On June 25, 1943, W. R. Grace & Co. filed in Docket 779 a reply to the answer and petition of Pan American Airways Corporation.

By petition dated September 9, 1943 Eastern Air Lines Inc. requested a consolidation of its application under Docket 782 with Docket 779. That petition was denied by order of the Board dated September 13, 1943.

Docket 779 came on for hearing before Assistant Chief Examiner Frances W. Brown and Examiner Vincent L. Gingerich on September 15, 1943 and continued from day to day until October 23, 1943.

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Statement Under Rule 13(4).

Pan American filed a motion dated September 14, 1943 to dismiss Docket 779 for want of jurisdiction, in which Eastern Air Lines joined. On September 23, 1943 the Board issued its order denying the motion without prejudice to its renewal at the close of the hearing. On October 21, 1943 Eastern Air Lines Inc. and National Airlines, Inc. filed motions to dismiss Docket 779. On October 23, 1943 Pan American renewed its motion to dismiss.

In November 1943 the Board ordered oral argument on the motion of Pan American to dismiss.

On December 2, 1943 W. R. Grace & Co. filed a cross-motion to defer oral argument and decision on Pan American's motion to dismiss until the time assigned for final argument on the merits of the case. By order dated December 17, 1943 the motion of W. R. Grace & Co. was denied.

Briefs on the motion to dismiss were submitted to the Civil Aeronautics Board on January 15, 1944 and oral argument was had on January 31, 1944. By order and opinion dated May 24, 1944, the Board dismissed Docket 779 for lack of jurisdiction.

W. R. Grace & Co. filed a petition for reargument and reconsideration, dated June 22, 1944. This petition was denied by order of the Board dated August 5, 1944.

Petition for review by this Court was filed, dated October 3, 1944. By order entered June 4, 1945 this Court denied a motion of respondent, Civil Aeronautics Board, joined in by Pan American Airways Corporation and Eastern Air Lines, to dismiss the appeal or affirm forthwith.

By order dated July 9, 1945, this Court granted the motion of W. R. Grace & Co. to require the Civil Aeronautics Board to certify as part of the record certain correspondence concerning the scope of the motion and argument, printed *infra*, pages 43-50.

By stipulation filed February 16, 1945, Cahill, Gordon, Zachry & Reindel were substituated as attorneys for petitioner in the place of Wright, Gordon, Zachry, Parlin & Cahill.

10

Order Dismissing Proceeding.

UNITED STATES OF AMERICA

CIVIL AERONAUTICS BOARD

WASHINGTON, D. C.

At a Session of the Civil Aeronautics Board Held at its Office in Washington, D. C., on the 24th Day of May, 1944.

11

IN THE MATTER of The PANAGRA TERMINAL INVESTIGATION under section 401 of the Civil Aeronautics Act of 1938, as amended.	Docket No. 779.

The Board, acting upon its own initiative, having instituted an investigation to determine whether the public convenience and necessity require that the certificate of public convenience and necessity of Panagra should be altered,
12 amended and modified to authorize and require that the route of Pan American-Grace Airways, Inc., between Buenos Aires, Argentina, and Cristobal, Canal Zone, be extended to a terminal in the United States at Miami, Tampa, or St. Petersburg, Florida; and

The Board, upon motions to dismiss said proceeding for lack of jurisdiction, having issued its opinion containing its findings, conclusions, and decision, which is attached hereto and made a part hereof, and finding its action in this matter is necessary pursuant to said opinion;

IT IS ORDERED, That the proceeding instituted by the Board by its order of September 10, 1942 (Order Serial No.

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1928), as amended by its order of October 22, 1942 (Order Serial No. 1991) be, and the same is dismissed.

By the Civil Aeronautics Board:

/s/ Fred A. Toombs,

Fred A. Toombs,
Secretary.

(Seal)

14

Opinion.

United States of America

CIVIL AERONAUTICS BOARD

Washington, D. C.

Docket No. 779.

Panagra Terminal Investigation

15

Decided: May 24, 1944.

Section 401(h) of the Act authorizes the Board, on its own initiative, to alter, amend, or modify a certificate of public convenience and necessity by including therein new terminal and intermediate points; but that authority does not permit the addition of new service which would be so extensive as to amount to a new air transportation route, or of such a kind as to substantially change the character of a carrier's system.

16 *Opinion.*

The extension of the route of Panagra to a terminal point in Florida would constitute a basic transformation in the character of that carrier's system and, therefore, cannot be ordered by the Board under section 401(h) of the Act.

Proceedings dismissed.

Appearances:

JOHN T. CAHILL and FRED J. KNAUER for W. R. Grace & Co.

17 HENRY J. FRIENDLY and J. P. KRANZ, JR. for Pan American Airways Corporation.

E. SMYTHE GAMBRELL and W. GLEN HARLAN for Eastern Air Lines, Inc.

WILLIAM I. DENNING and COATES LEAR for National Airlines, Inc.

H. R. BOLANDER, JR. for Chicago and Southern Air Lines, Inc.

JOHN H. WANNER, H. DON REYNOLDS, and MELVIN S. COHEN for the Civil Aeronautics Board.

18 BY THE BOARD:

This proceeding comes before us at this time on a motion to dismiss which challenges the Board's jurisdiction.

Before proceeding to a determination of the principal issue presented to the Board at the present stage of this case, it is necessary to review briefly the circumstances which gave rise to the proceeding. Pan American-Grace Airways, Inc., hereinafter referred to as Panagra, was incorporated in 1929 by its present co-owners Pan American Airways Corporation and W. R. Grace & Co., hereinafter referred to as Grace, each of which purchased, and has at all times since then owned, 50 per cent of Panagra's outstanding capital stock. Shortly after its incorporation,

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Panagra secured a mail contract with the Postmaster General for the transportation of mail between the Canal Zone and Buenos Aires, Argentina, via various points on the west coast of South America. Operations under the contract were commenced on May 17, 1929, between the Canal Zone and Mollendo, Peru, and were extended to Buenos Aires on or about October 12, 1929. Since that date, Panagra has transported persons, property, and mail on its entire route between the Canal Zone and Buenos Aires. From time to time additional points and local services have been added to the route, so that at the present time its system comprises approximately 8,800 route miles.

Pan American Airways, Inc., a wholly-owned subsidiary of Pan American Airways Corporation, has operated international air transportation services since 1927. Since November 1931, it has operated an air transportation service between Miami, Florida, and Buenos Aires by way of points in the Caribbean and on the east coast of South America. In addition to that service, and others, Pan American Airways, Inc., has operated services between Miami and the Canal Zone and between Brownsville, Texas, and the Canal Zone, making connections at the Canal Zone with the services of Panagra.

The route between Miami and Buenos Aires via the Canal Zone and Panagra's west coast route is shorter than the route of Pan American Airways, Inc., between Miami and Buenos Aires via east coast points and the so-called Brazilian cut-off. At no time has Panagra operated regular air transportation service north of the Canal Zone. Although traffic between the United States and points on the west coast of South America and Buenos Aires constitutes a large and important share of Panagra's total business, this traffic has been carried between the United States and the Canal Zone by other carriers, largely by Pan American Airways, Inc., and at that point delivered to or received from Panagra for onward transportation. Most of the business interchanged by Pan American and Panagra at

the Canal Zone is carried over Pan American's Miami-Canal Zone route, and originates in or is destined to the eastern seaboard of the United States. Other important contributions to Panagra's traffic flow are made to or from the Canal Zone through the Brownsville gateway, and through the Los Angeles gateway served by Pan American's subsidiary Companía Mexicana, S. A. Some traffic originating on or destined for the north coast of South America is also interchanged with Panagra at the Canal Zone. In addition, Pan American Airways, Inc., has recently been
23 authorized to serve New Orleans, and its New Orleans-Canal Zone service via Central America will enable traffic to be interchanged with Panagra at the Canal Zone.

The New Orleans-Canal Zone route was granted to Pan American by the Board on February 26, 1943, for a three year period.[1] The record in the present proceeding shows that prior to the hearings in the New Orleans case the Grace representatives on the Board of Directors of Panagra urged that Panagra should apply for a route between the Canal Zone and New Orleans. This proposal was not acceptable to the Pan American representatives on the Panagra Board. Since Pan American and Grace held equal stock ownership and representation on the Panagra Board, the proposal of
24 the Grace representatives failed for lack of a majority.

When efforts to secure the filing of an application by Panagra failed, Grace filed, on May 3, 1941, a petition for leave to intervene in the New Orleans case alleging that since Panagra was not filing an application Grace proposed to file an application in its own behalf for a certificate for a route between the United States and the Canal Zone. Grace was granted leave to intervene, but did not file an application for a certificate during the time that case was pending.

On December 16, 1941, Grace filed a petition and complaint, Docket No. 707, requesting the Board to institute

[1] Pan American Airways, Inc., *et al.*—Service from New Orleans to Cuba and Central America, 4 C. A. B. , decided February 26, 1943.

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a proceeding pursuant to section 401(h) of the Act to alter, amend, and modify Panagra's certificate of public convenience and necessity so as to make the northern terminal of its route a point in the United States such as Miami or Tampa, Florida, or New Orleans, Louisiana. On April 29, 1942, Grace filed a second complaint, Docket No. 744, requesting the Board to require Pan American Airways Corporation, pursuant to section 411 of the Act and sections 7 and 11 of the Clayton Act, to cease and desist from certain matters alleged by Grace to be in violation of those sections, and to divest itself of its ownership of the stock of Panagra to the extent necessary to divest itself of its present negative control of Panagra; and also renewing its request in Docket No. 707.

No formal steps were taken by the Board in connection with the Grace petitions in Dockets Nos. 707 and 744 until September 1942. During this period all action in the New Orleans case also was postponed under the Board's policy, announced December 12, 1941, of suspending further action in all proceedings pending before it under sections 401(d) and 401(h) of the Act "in order that the immediate and maximum attention of air carriers and their personnel, and that of the Civil Aeronautics Board, as well as other Government agencies concerned, may be available for the most efficient discharge of the emergency demands" arising out of the war.

However, the Board did explore the possibility of working out a voluntary settlement of the controversy between Pan American and Grace. Numerous conferences were held by the Board with both parties. Finally, the Board suggested that the parties enter into an agreement under which sufficient shares of the two stockholders would be transferred to an independent public voting trustee or trustees to permit the election to the Panagra Board of an independent director or directors, or under which such an independent public director or directors might be otherwise appointed, who would be able to break the deadlock result-

ing from the equal division of the ownership of Panagra stock between Pan American and Grace. After it became apparent that no satisfactory voluntary arrangement could be mutually agreed upon by the parties and that all efforts to mediate the differences between them would be unsuccessful, the Board, on September 10, 1942, issued its order (Serial No. 1928),[2] as amended by its order of October 22, 1942 (Serial No. 1991)[3] instituting the present proceeding.

The proceeding was instituted by the Board pursuant to section 401(h) of the Act, which provides in part as follows:

29 "(h) The Authority, upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify, or suspend any such certificate [of public convenience and necessity], in whole or in part, if the public convenience and necessity so require, * * *."

The orders provide that it is the purpose of the proceeding to determine whether the public convenience and necessity require that the certificate of public convenience and necessity of Panagra should be altered, amended, and modified to authorize and require that Panagra's route between
30 Buenos Aires, Argentina, and Cristobal, Canal Zone, be extended to a terminal in the United States at Miami, Tampa, or St. Petersburg, Florida. Grace, Pan American Airways, Inc., and Panagra, were made parties to the proceeding, and subsequently the Department of Justice, Pan

[2] "A proceeding is hereby instituted by the Board to determine whether the public convenience and necessity require that the certificate of public convenience and necessity of Panagra should be altered, amended, and modified to authorize and require (a) that Panagra's route terminate in the United State at Miami or Tampa, Florida; New Orleans, Louisiana; Brownsville or El Paso, Texas; Los Angeles, California; or at two or more of said points; and (b) in the event a terminal or terminals in the United States are authorized and required pursuant to this proceeding, that Panagra serve one or more intermediate points between the Canal Zone and said terminal or terminals in the United States."

[3] "Paragraph 1(a) of the aforesaid order of the Board dated September 10, 1942 (Order Serial No. 1928) be and it is amended by striking out the words 'Miami or Tampa, Florida; New Orleans, Louisiana; Brownsville or El Paso, Texas; Los Angeles, California', and inserting in lieu thereof the words 'Miami, Tampa, or St. Petersburg, Florida.'"

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American Airways Corporation, National Airlines, Inc., TACA, S. A., Eastern Air Lines, Inc., and Chicago and Southern Air Lines, Inc., were granted permission to intervene. 31

Hearings in the proceeding began on September 15, 1943. On the same day Pan American Airways Corporation filed with the Board a motion to dismiss the proceeding for want of jurisdiction, which was denied by the Board on September 23, 1943, without prejudice to its renewal at the close of the hearing. Hearings were then completed and Pan American renewed its motion, in which it was joined by Eastern Air Lines and National Airlines. Briefs in support of, and in opposition to, the motion were submitted on January 15, 1944, and oral argument on the motion was heard by the Board on January 31, 1944. 32

The motion to dismiss asserts that the Board is without power, under the provisions of the Act, to order an extension of Panagra's route from the Canal Zone to Florida. It is contended that section 401(h) does not grant the Board power to extend the route of an air carrier and, in the alternative, that even though such power is granted, the Board cannot compel the carrier to extend its lines into a territory not previously served by that carrier.

The question presented to us by the motion is one of statutory construction; namely, does the power of the Board under section 401(h) to "alter", "amend", and "modify" a certificate of public convenience and necessity include the power to compel, in the absence of an application from the carrier, a route extension of the character involved in the case before us. If the statute does not authorize such an extension, the proceeding must be dismissed; if it does, the motion to dismiss must be denied. 33

We are of the opinion that this section of the Act does authorize the Board to add new points or services to the certificate of a carrier on the Board's own initiative and without an application by, and the consent of, the carrier; but this authority does not include the addition of new ser-

vice which would be so extensive as to amount to a new air transportation route, or of such a kind as to substantially change the character of a carrier's system.

Section 401(a) of the Act is the keystone of the Act's regulatory plan with respect to the extent of the operations of air carriers. It provides that "no air carrier shall engage in any air transportation unless there in in force a certificate issued by the Authority [Board] authorizing such air carrier to engage in such air transportation." Section 401(f) requires that "Each certificate * * * shall specify the
35 terminal and intermediate points, if any, between which the air carrier is authorized to engage in air transportation" and in the case of a certificate for foreign air transportation provides that a certificate need "designate only the general route or routes to be followed" if the designation of terminal and intermediate points is not practicable.

The fundamental regulatory purpose which certificates of public convenience and necessity serve is to prescribe, and thereby to control, the extent of the air transportation which each particular carrier may carry on. The principal components of a certificate are the terminal and intermediate points and the classes of traffic to be served and, in view of the purposes of the certificate procedure, it is clear
36 that any other terms of a certificate are simply incidental to these major elements. Under these circumstances, the conclusion is inescapable that when section 401(h) provides that the Board "may alter, amend, [or] modify, * * * any such certificate" it constitutes a grant of power to alter, amend, or modify that which is the significant part of a certificate and which is the basis for the operation of the certificate scheme as a regulatory device, namely, the terminal and intermediate points and classes of traffic authorized to be served. There is nothing in the usual and ordinary meaning of the words of the statutory phrase "may alter, amend, [or] modify any such certificate", which requires, or even justifies, a contrary conclusion.

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It has been argued that other Federal statutes in the railroad, motor carrier, natural gas, communications and electric power fields show a congressional intent to grant to Federal regulatory agencies a circumscribed and carefully delineated power to compel extensions of public utility services, and that, in the absence of similar language in the Civil Aeronautics Act spelling out the precise power of the Board to compel extensions of airline service, the power granted by section 401(h) is extremely limited in scope. In our opinion, however, an examination of these statutes reveals that they differ so greatly from the Civil Aeronautics Act in language and purpose, and in the factual situations to which they relate, that their relation to the problem before us is too remote to be significant.

38

Consideration of the legislative history of the Act is of no assistance in resolving the question. Such material as the parties have presented as significant seems about equally susceptible of being construed as supporting or as denying the existence of the power of extension. It is pointed out, for example, that in several of the aviation bills which were introduced in Congress prior to the final enactment of the Civil Aeronautics Act, provisions were included, in addition to a section similar to the present section 401(h), which stated that the Board should have power to require an "extension of service". It is argued from this that since such a provision was dropped from the legislation as finally enacted it is indicated that Congress did not intend the Board to have the power to order compulsory extensions of a carrier's route. On the other hand, those opposing the motion in this proceeding take the position that the eventual omission from the Act of this provision of the earlier bills indicates that Congress believed the provision to be unnecessary since section 401(h) already provided for such a power. The legislative background appears to us to be entirely inconclusive on the point.

39

References to other provisions of the Act shed little light on the problem. It has been argued in support of the

motion that the omission from section 401(h) of the phrase, which appears in section 401(d), that the Board must find a carrier "fit, willing, and able" indicates that an extension of service cannot be authorized under the former section; and that since section 404, providing that "It shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate * * *," does not apply to foreign air transportation, section 401(h) must be construed as not authorizing the Board to compel an extension of service since the Act gives
41 the Board no power to order the rendering of the new service.

Opponents of the motion, on the other hand, contend that the omission of the words "fit, willing, and able" from section 401(h) shows that the power of the Board requiring extensions of service under section 401(h) may be exercised even though the carrier is not "willing" to render the service. It is contended also that the inapplicability of section 404 to foreign air transportation is not material in view of the fact that section 401(k) provides that "no air carrier shall abandon any route, or part thereof, for which a certificate has been issued" unless the Board approves the abandonment—although it is arguable that section 401(g),
42 which provides that the Board shall suspend or revoke a certificate if the service authorized thereby is not inaugurated within 90 days, prescribes the exclusive method of handling a carrier's failure to start a newly authorized service. Parties opposing the motion cite the language of section 401(n) as indicating that the Board's power in section 401(h) to amend a certificate includes the power to provide for additional services. That section, after providing for the certification to the Board by the Postmaster General of the need for additional mail service, states that the Board shall, where required by the public convenience and necessity, "make provision for such additional service * * * by amending an existing certificate or certificates." This point is countered by the argument that the section

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does not refer to compulsory extensions of service and consequently is of no aid in determining whether section 401(h) provides for compulsion. As in the case of the legislative history, we find no clear indication in the other provisions of the Act as to the Congressional intent concerning the meaning of section 401(h). The provisions of the Act in that respect are inharmonious and any conclusion drawn therefrom must rest at best on a delicate foundation of an extremely involved process of reasoning in order to reconcile the various provisions.

Under such circumstances, the sound approach to the 44
question of statutory construction presented here is to rely upon the usual and ordinary meaning of the statutory language as fully expressing the intent of Congress; by applying that meaning to the language of section 401(h), we find in the section a grant of power to the Board to compel extensions of service. It remains to be determined whether there are limits upon the character or size of the extensions which can be required.

Although the power to alter, amend, and modify certificates of public convenience grants a broad and important power to the Board, it is apparent that the words alter, amend, and modify connote a limited power to change an existing certificate. The power to alter, amend, and modify 45
does not include the power to transform the essential character of the thing being altered, amended, or modified. Thus it was held in *Smith* v. *United States*, 74 F. (2d) 941, 942 (C. C. A. 5th, 1935) that power to alter means power "to change without destroying the identity of the thing changed." In *Interstate Commerce Commission* v. *Oregon-Washington R. R. & Navigation Co.*, 288 U. S. 14 (1933) the Supreme Court held (Justices Cardozo, Stone and Brandeis dissenting) that paragraph (21) of section 1 of the Interstate Commerce Act did not authorize the Interstate Commerce Commission to compel the particular extension of the lines of a railroad presented to the court in that case. The significant point for present purpose, how-

ever, is that even the dissenting Justices, who took the position that the extension under consideration was lawful, conceded that the word "extension" used in the statute being construed did not authorize unlimited additions of new services.

While we must find, therefore, that there are limits to the scope of the grant of power in section 401(h), the generality of the statutory language makes it impossible to draw any precise line of demarcation between what is permitted and what is not.

47 It has been argued that by reason of constitutional limitations section 401(h) must be construed as giving the Board power to compel only those extensions of service which are within the scope of the undertaking of a carrier. Decisions by State and Federal Courts are cited as supporting this view and it is asserted that this principle must have been known to Congress and incorporated by it in the provisions of the Civil Aeronautics Act. While it is true that in a number of opinions the courts have recited as a rule of Constitutional law the principle that a utility cannot be compelled to extend its service into territories which it has not undertaken to serve,[4] the courts have not given express recognition to the existence of that principle in all

48 cases. There are cases in which orders compelling extensions of service seem to have been held to be valid simply on a finding by the courts that the order was reasonable.[5] The contrast between the two different expressions of principle involved is brought out forcibly in *Interstate Commerce Commission* v. *Oregon-Washington R. R. & Navigation Co.*,

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[4] *Interstate Commerce Commission* v. *Oregon-Washington R. Nav. Co.*, 288 U. S. 14, 77 L. Ed. 588, 53 Sup. Ct. 266 (1933); *Atchison, T. & S. F. R. Co.* v. *Railroad Commission*, 173 Cal. 577, 160 Pac. 828 (1916); *Hollywood Chamber of Commerce* v. *Railroad Commission*, 192 Cal. 307, 219 Pac. 983 (1923); *Oklahoma Natural Gas Co.* v. *Corporation Commission*, 88 Okla. 51, 211 Pac. 401 (1922); *Southern Bell Tel. & Tel. Co.* v. *Town of Calhoun*, 287 Fed. 381 (W. D. S. C., 1923).

[5] *New York ex rel. Woodhaven Gas Light Co.* v. *Public Utilities Commission*, 269 U. S. 244, 70 L. Ed. 255, 46 Sup. Ct. 83, (1925); *New York ex rel. New York & Q. G. Co.* v. *McCall*, 245 U. S. 345, 62 L. Ed. 337 (1917); *International Bridge Co.* v. *New York*, 254 U. S. 126, 65 L. Ed. 176 (1920).

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supra. While the decision in that case turned upon a question of statutory construction, the majority of the court indicated clearly that it felt that the Constitution would not permit an extension beyond the profession of service of the carrier.

On the other hand, the dissenting opinion expresses the view that:

> "As long as governmental orders are kept within the range of reason, their operation is unaffected by expectation or desire.
>
> "The Fifth Amendment of the Constitution is invoked by the carriers but invoked without avail. Consistently with that Amendment Congress may delegate to the Commission the power to force upon unwilling carriers an extension of their lines into fields of old service and of new. Much of what has been written in this opinion as to the meaning of the statute is pertinent also to an inquiry as to power. Again the thought is to be kept before us that the need of the public, not the acquiescence of the carrier, is the measure of the service, provided only that for such service there is adequate requital. Whether such requital has been assured is a question not susceptible of answer except in the setting of the circumstances."

50

51

We cannot find that the so-called profession of service rule is a sound limitation on the power of extension. A public utility professes to serve in fact only that which it is serving at the time, or in the case of an air carrier only the terminal and intermediate points and classes of traffic currently covered by its certificate. It seems to us, therefore, that the rule is meaningless as a test of the validity of an order compelling the inauguration of a new service; and to give lip-service to the principle would not be consistent with intelligent administration of the Act. Modern con-

cepts of the scope of governmental regulatory power support the soundness of the conclusion of the dissenting Justices in the *Interstate Commerce Commission* v. *Oregon-Washington R. & Navigation Co.* case that the constitutional validity of governmental orders is to be tested by the standard of reasonableness.[6]

While in our opinion neither the Constitution nor the principles of statutory construction restrict the power of the Board under section 401(h) to ordering compulsory extensions which are within the undertaking of the air carrier, nevertheless, as we have pointed out earlier, the con-
53 trolling statutory words are not unlimited in meaning. We believe that the fair construction of the scope of the terms "alter", "amend", or "modify" can be best expressed in the language used by the dissenting opinion in the Oregon case to define the term "extension":

> "• • • [They do] not fairly connote a prolongation so vast and sudden as to work an utter transformation of the character of the road, making what was extended the incident and the extension the principal. The action of the Commission must have a basis in reason, and its order must be viewed with
> 54 reference to the length and other conditions of the line or lines to be enlarged. No doubt there is a point at which the enlargement of a road becomes 'the construction of a new line' rather than the extension of an old one."

It is on the basis of these principles that we now turn to the consideration of the extension of Panagra's system to a terminal point in the United States.

Since its incorporation in 1929 Panagra's commercial operations at all times have been confined to the transportation of passengers, cargo, and mail between the Canal Zone and points in South America. While a large propor-

[6] *Nebbia* v. *New York*, 291 U. S. 502, 78 L. Ed. 940 (1934).

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tion of its total traffic has consisted of traffic flowing between the United States and South America, that traffic has been moved north of the Canal Zone by other carriers. The extension of Panagra's system referred to in the order instituting the present proceeding would give the carrier direct access to one or more of the major gateways for through traffic between the United States and Latin America. The extension would permit it to connect directly with the domestic air transportation system of the United States, without the necessity of relying upon the connecting services of Pan American and other carriers operating in the 56
foreign field for access to traffic flowing to and from the continental United States. The extension would increase the route mileage of Panagra approximately 1,200 miles, or about 14 per cent of its existing mileage. It is estimated that the extension initially would require an additional capital investment on the part of Panagra of around $800,000 which compares with Panagra's gross assets at the end of 1942 of $10,700,000 and its net worth, exclusive of goodwill, of over $3,000,000.

In the light of the conditions surrounding the extension here involved we conclude that the requiring of the extension would not be within the power granted the Board by 57
section 401(h) to "alter, amend, [or] modify" Panagra's certificate. The length of the mileage of the new service and the amount of additional investment required to operate it have been factors in reaching this conclusion. However, the principal consideration which influences us is the fact that to extend the Panagra system from the Canal Zone to a point in Florida would constitute a basic transformation of the character of the carrier. Panagra, now a connecting carrier as to through traffic between the United States and South America, would be made a carrier directly serving that traffic—and serving it moreover in competition with an affiliated company. There is a fundamental difference between the position of a carrier whose routes stop so far short of the continental United States as those of

Panagra and which depends upon connecting carriers for access to traffic to and from that area, and a carrier which has direct access to the continental United States over its own system. It does not seem reasonable to believe that Congress contemplated that such a change in the character of a carrier's system should be compelled by Government order. We find, therefore, that the extension of Panagra's route from the Canal Zone to the United States would not be an alteration, amendment, or modification of its certificate within the meaning of section 401(h) of the Act in the
59 sense that the Board could compel such an extension in the absence of an application from Panagra.

Regardless of which of the co-owners of Panagra is at fault, the very fact that a controversy of this kind has developed indicates that an unhealthy condition exists in the internal affairs of the company. A decision by the Board, after consideration on the merits, of the question of whether or not Panagra's routes should be extended to some point or points in the continental limits of the United States would remedy one particular controversy between the co-owners; but it would not solve the basic difficulties of the Panagra joint ownership.

60 This is an inherently bad situation. Deadlock between the two interests equally represented in the ownership of the company is always possible, and certain to occur from time to time, especially in view of the special interests and the other activities of the two co-owners. We have sought remedy under the Civil Aeronautics Act, but after having the facts presented in extensive public hearings we must conclude that the Act does not give the Board the power to take the action contemplated by this proceeding.

An appropriate order will be entered dismissing the proceeding.

Pogue, Chairman, Warner, Ryan and Lee, Members of the Board, concurred in the above opinion. Branch, Member, did not take part in the decision.

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Order Denying Reargument and Reconsideration.

61

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
Washington, D. C.
Adopted by the Civil Aeronautics Board
at its Office in Washington, D. C.,
on the 5th Day of August, 1944.

IN THE MATTER *of* The alteration, amendment and modification of the certificate of public convenience and necessity of PAN AMERICAN-GRACE AIRWAYS, INC. under section 401(h) of the Civil Aeronautics Act of 1938, as amended, to provide for a route terminal in the United States.	Docket No. 779.

62

W. R. Grace & Co. having filed a petition for reargument and reconsideration of the Board's opinion and order Serial Number 2867 dated May 24, 1944, granting the motion of Pan American Airways Corporation to dismiss the above-entitled proceeding for lack of jurisdiction; and 63

The Board, upon due consideration of all the matters set forth in said petition, finding that the grounds set forth therein are insufficient to justify granting the relief requested;

IT IS ORDERED, That said petition of W. R. Grace & Co. be and it is denied.

By the Civil Aeronautics Board:

/s/ FRED A. TOOMBS,

(SEAL)

FRED A. TOOMBS,
Secretary.

64 **Order Denying Cross Motion.**

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
Washington, D. C.
Adopted by the Civil Aeronautics Board at its Office in Washington, D. C., on the 17th Day of December, 1943.

IN THE MATTER *of* The alteration, amendment, and modification of the certificate of public convenience and necessity of PAN AMERICAN-GRACE AIRWAYS, INC. under section 401(h) of the Civil Aeronautics Act of 1938, as amended, to provide for a route terminal in the United States.	Docket No. 779.

65

66 W. R. Grace and Company, having filed a motion on December 3, 1943, requesting the Board to defer oral argument on and consideration of the motion of Pan American Airways Corporation to dismiss the above-entitled proceeding for want of jurisdiction until the final argument upon the merits, subsequent to the filing of the examiner's report; and

The Board finding, upon due consideration of all matters set forth in the said motion, that W. R. Grace and Company sets forth insufficient grounds for the relief requested:

IT IS ORDERED That the said motion be and it is denied.

By the Civil Aeronautics Board:

/s/ FRED A. TOOMBS,

(SEAL) FRED A. TOOMBS,
Secretary.

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67

Order Instituting Proceeding.

UNITED STATES OF AMERICA

CIVIL AERONAUTICS BOARD

WASHINGTON, D. C.

At a session of the Civil Aeronautics Board
held at its office in Washington, D. C.
on the 10th day of September, 1942

68

IN THE MATTER
of

The alteration, amendment and modification of the certificate of public convenience and necessity of PAN AMERICAN-GRACE AIRWAYS, INC. under section 401(h) of the Civil Aeronautics Act of 1938, as amended, to provide for a route terminal in the United States.

Docket No. 779.

69

It appearing to the Board:

1. That W. R. Grace &Co. (hereinafter called "Grace") and Pan American Airways Corporation each own 50 per cent of the stock of Pan American-Grace Airways, Inc. (hereinafter called "Panagra"); and

2. That Grace has filed with the Board a petition (Docket No. 707) for the alteration, amendment and modification of the certificate of public convenience and necessity of Panagra pursuant to section 401(h) of the Civil Aeronautics Act of 1938, as amended, so as to name a point within the United States as a terminal of Panagra's route; and

3. That Grace alleges in said petition that Panagra's primary function is to provide air transportation over its

route for passengers, property, and mail between the United States and the west coast of South America; that at the present time Panagra is dependent on Pan American Airways, Inc. (hereinafter called "Pan American"), a wholly owned subsidiary of Pan American Airways Corporation, for connecting service between the United States and the Canal Zone; and that such connecting service has been unsatisfactory for the reasons alleged in said petition; and

71 4. That unsatisfactory connecting service, if such exists, may result in air transportation service to the public between the United States and the west coast of South America which is inadequate and deficient as to both quality and quantity, and may also result in retarding the proper and sound development of air transportation service between the United States and the west coast of South America; and that such results would not be in the public convenience and necessity or in the public interest as defined in section 2 of said Civil Aeronautics Act of 1938, as amended; and

72 5. That Pan American is the only air carrier authorized at the present time to engage in air transportation between the United States and South America, and that an additional service by another air carrier may provide competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense; and

6. That Grace in its petition, Docket No. 744, alleges that Panagra, because of the opposition of its 50 per cent stockholder, Pan American Airways Corporation, is not authorized by its Board of Directors and stockholders to make application to this Board for the amendment of its certificate of public convenience and necessity so as to provide for said terminal in the United States; and

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Order Instituting Proceeding. 73

The Board finding that its action herein is necessary in order to carry out the provisions of, and to exercise and perform its duties under the Civil Aeronautics Act of 1938, as amended, and acting upon its own initiative and pursuant to the powers and duties vested in it under Titles II, IV, and X of the Civil Aeronautics Act of 1938, as amended, particularly section 401(h) thereof;

It is Ordered:

1. That a proceeding is hereby instituted by the Board to determine whether the public convenience and necessity 74 require that the certificate of public convenience and necessity of Panagra should be altered, amended, and modified to authorize and require (a) that Panagra's route terminate in the United States at Miami or Tampa, Florida; New Orleans, Louisiana; Brownsville or El Paso, Texas; Los Angeles, California; or at two or more of said points; and (b) in the event a terminal or terminals in the United States are authorized and required pursuant to this proceeding, that Panagra serve one or more intermediate points between the Canal Zone and said terminal or terminals in the United States; and

2. That Panagra, Grace, and Pan American are made 75 parties to this proceeding; and

3. That this proceeding be assigned for public hearing before an examiner of the Board at a time and place hereafter to be designated.

By the Civil Aeronautics Board:

/s/ Darwin Charles Brown,

Darwin Charles Brown,
Secretary.

(Seal)

76

Order Amending Order Instituting Proceeding.

UNITED STATES OF AMERICA

CIVIL AERONAUTICS BOARD

WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 22nd day of October, 1942

77

IN THE MATTER *of* The alteration, amendment, and modification of the certificate of public convenience and necessity of PAN AMERICAN-GRACE AIRWAYS, INC. under section 401(h) of the Civil Aeronautics Act of 1938, as amended, to provide for a route terminal in the United States.	Docket No. 779.

78

The Board, by its order of September 10, 1942 (Order Serial No. 1928), having instituted a proceeding (Docket No. 779) to determine whether the public convenience and necessity require that the certificate of public convenience and necessity issued to Pan American-Grace Airways, Inc. (hereinafter called "Panagra") should be altered, amended, and modified to authorize and require (a) that Panagra's route terminate in the United States at Miami or Tampa, Florida; New Orleans, Louisiana; Brownsville or El Paso, Texas; Los Angeles, California; or at two or more of said points; and (b) in the event that a terminal or terminals in the United States are authorized and required pursuant to said proceeding, that Panagra serve one or

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more intermediate points between the Canal Zone and said terminal or terminals in the United States; and

IT APPEARING TO THE BOARD, upon further consideration of said matter:

1. That the greatest volume of traffic moving between the United States and the Canal Zone and the west coast of South America originates in or is destined to that portion of the United States lying east of the Mississippi river;

2. That the extension of Panagra's route to Miami, 80
Tampa, or St. Petersburg, Florida, would require the addition of less mileage to Panagra's route than would the extension of said route to New Orleans, Brownsville, El Paso, or Los Angeles;

3. That the elimination of Los Angeles, El Paso, Brownsville, and New Orleans, from consideration as terminals of said route will simplify the issues and expedite final determination of the proceeding in said Docket No. 779; and

The Board finding that its action is necessary in order to carry out the provisions of and to exercise its powers and perform its duties under Titles II, IV, and X of the Civil 81
Aeronautics Act of 1938, as amended, and particularly sections 205(a) and 401(h) thereof;

IT IS ORDERED:

1. That paragraph 1(a) of the aforesaid order of the Board dated September 10, 1942 (Order Serial No. 1928) be and it is amended by striking out the words "Miami or Tampa, Florida; New Orleans, Louisiana; Brownsville or El Paso, Texas; Los Angeles, California", and inserting in lieu thereof the words "Miami, Tampa, or St. Petersburg, Florida";

82 *Order Amending Order Instituting Proceeding.*

2. That all requests and motions for consolidation of other applications and dockets with this proceeding are hereby denied;

3. That motions for leave to intervene in this proceeding shall be filed with the Board within 10 days after the date of adoption of this order by the Board.

By the Civil Aeronautics Board:

/s/ DARWIN CHARLES BROWN,

83

DARWIN CHARLES BROWN,
Secretary.

(SEAL)

84

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85

Motion of Pan American Airways Corporation to Dismiss for Want of Jurisdiction.

BEFORE THE

CIVIL AERONAUTICS BOARD

IN THE MATTER *of* The alteration, amendment and modification of the certificate of public convenience and necessity of PAN AMERICAN-GRACE AIRWAYS, INC. under section 401(h) of the Civil Aeronautics Act of 1938, as amended, to provide for a route terminal in the United States.	Docket No. 779.

86

Communications with respect to this motion should be addressed to

87

ROOT, CLARK, BUCKNER & BALLANTINE,
Attorneys for Pan American Airways Corporation,
31 Nassau Street,
New York 5, N. Y.

HENRY J. FRIENDLY,
CHARLES C. MACLEAN, JR.,
J. P. KRANZ, JR.,
J. H. HAMSTRA,
Of Counsel.

88 *Motion of Pan American Airways Corporation to Dismiss for Want of Jurisdiction.*

BEFORE THE

CIVIL AERONAUTICS BOARD

IN THE MATTER *of* The alteration, amendment and modification of the certificate of public convenience and necessity of 89 PAN AMERICAN-GRACE AIRWAYS, INC. under section 401(h) of the Civil Aeronautics Act of 1938, as amended, to provide for a route terminal in the United States.	Docket No. 779.

Now comes your petitioner, Pan American Airways Corporation, a corporation organized and existing under the laws of the State of Delaware, and moves that the Board dis-
90 miss this proceeding for want of jurisdiction, and for grounds of such motion represents as follows:

I.

THE STATUS OF THE PETITIONER TO MAKE THIS MOTION.

Your petitioner is, and since the organization of Pan American Grace Airways, Inc. has been, the owner of half of the capital stock of said Pan American-Grace Airways, Inc. By petition dated September 23, 1942, your petitioner sought leave to intervene and become a party to this proceeding, without prejudice to any position which it might be advised to take as to the legal power of the Board to alter, amend or modify the certificate of Pan American-

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91

Grace Airways, Inc. as proposed in the order of the Board initiating this proceeding or as to the jurisdiction of the Board. Said petition was granted by Order Serial Number 2030, dated November 12, 1942. Petitioner's appearance in this proceeding and this motion are subject to the same conditions stated in said petition.

II.

THE BOARD IS WITHOUT JURISDICTION IN THIS PROCEEDING.

92

Petitioner moves that the Board dismiss this proceeding on the ground that, for the reasons hereinafter set forth, the Board does not have the legal power to order Pan American-Grace Airways, Inc. to operate to a terminal in the United States, as proposed in the Board's order initiating this proceeding, and that the Board is without jurisdiction herein:

1. Pan American-Grace Airways, Inc. was formed pursuant to an agreement dated August 31, 1928, between your petitioner and W. R. Grace & Co. "for the commencement of an airplane service in Peru with the view of ultimately inaugurating a through mail service from the Panama Canal to Valparaiso, Chile." That the scope of the venture was so understood by W. R. Grace & Co. appears from the minutes of the Board of Directors of W. R. Grace & Co. held on February 20, 1929, submitted in this proceeding, which recite that "a proposal was submitted to create and establish a permanent air service from Panama to Valparaiso • • •." For many years Pan American-Grace Airways, Inc. has operated an airline from the Canal Zone along the west coast of south America. It holds a certificate for such operation.

93

2. The minutes of the Board of Directors of Pan American-Grace Airways, Inc., submitted in this proceeding, show

94 *Motion of Pan American Airways Corporation to Dismiss for Want of Jurisdiction.*

that the Board of Directors has never authorized the filing of an application by Pan American-Grace Airways, Inc., to operate north of the Canal Zone and that a resolution to that end failed of passage, the directors being evenly divided.

3. The Civil Aeronautics Act admittedly contains no provision *expressly* empowering the Board to require an air carrier to extend its lines.

95 4. The Board's asserted jurisdiction to take the action proposed in this proceeding must rest upon section 401(h) of the Act, which provides as follows:

> "(h) The Authority, upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate:
> 96 *Provided,* That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Authority, with an order of the Authority commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Authority to have been violated. Any interested person may file with the Authority a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of a certificate."

5. When the provisions of section 401(h) are read in their context, it becomes clear that the grant of power

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therein to "alter, amend, modify or suspend any such certificate" was in no way intended to authorize the Board to require a carrier to operate in a different territory from that specified in its certificate. Had Congress supposed that section 401(h) permitted this, it would certainly have required the Board to find that the carrier was fit and able to operate under such an amended certificate, and would also have inserted provisions to protect the carrier against impairment of its capital similar to those in Section 1(21) of the Interstate Commerce Act. 98

6. These general "amendment" provisions in section 401(h) are wholly insufficient as a foundation for an order such as that here proposed, requiring a carrier to extend its operations over a new route 1,200 miles long, through an area which the carrier has never previously served. The power to compel private property to be devoted to a new use without the assent of its owner, is so extraordinary that it cannot be rested upon mere implication.

7. The absence of express authority in the Civil Aeronautics Act to require an air carrier to extend its operations cannot be dismissed as accidental. In the Transportation Act, 1920, Congress had specifically vested such power with respect to railroads in the Interstate Commerce Commission, providing, in paragraph (21) of section 1, as follows: 99

> "(21) The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this part, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this part, and to extend its line or lines: *Provided*, That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in

100 *Motion of Pan American Airways Corporation to Dismiss for Want of Jurisdiction.*

> the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public."

Bills for the regulation of air transportation, preceding the Civil Aeronautics Act, had contained similar provisions. Thus S. 3187 (73d Congress), introduced by Senator McCarran on March 26, 1934, contained a provision in section 13(d) conferring the power of compulsory extension in
101 phraseology substantially identical with that of section 1(21) of the Interstate Commerce Act. Similar provisions granting the power of compulsory extension were contained in section 16(d) of S. 1332 (74th Congress) introduced by Senator McCarran on January 22, 1935, and in section 301(9) of H. R. 5174 (74th Congress), introduced by Representative Lea on January 31, 1935. On the other hand, the Motor Carrier Act, 1935, enacted on August 9, 1935, contained no compulsory extension provision. The Civil Aeronautics Act followed that pattern.

8. The absence of provision for compulsory extension
102 from the Civil Aeronautics Act, in the face of such provisions in parallel legislation and in predecessor bills of the Act itself, should be conclusive against the existence of such power *in any case*. In this case, however, there is an additional factor, namely, the rule that a statute must be interpreted so as to avoid constitutional doubts. While an agency of Congress cannot declare a statute unconstitutional, nevertheless such an agency *in applying a statute* must heed this canon of construction. The Supreme Court has held that, under this canon, even the *express* compulsory extension provisions of section 1(21) of the Interstate Commerce Act must be limited to extensions *within the carrier's undertaking to serve*, and cannot be applied so as to require a railroad to extend 185 miles into a territory not thereto-

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fore served, the Court saying (*Interstate Commerce Commission* v. *Oregon-Washington Railroad and Navigation Co.*, 288 U. S. 14, 40 (1933)):

> "Our duty is to construe the statute, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score. The views advanced by the appellants to say the least raise serious questions in this respect. The railroads, though dedicated to a public use, remain the private property of their owners, and their assets may not be taken without just compensation. The Transportation Act has not abolished this proprietorship."

9. If, as held by the Supreme Court, the Interstate Commerce Commission erred in construing the *specific* compulsory extension language of section 1(21) of the Interstate Commerce Act as authorizing it to require a railroad to extend into new territory, *a fortiori* it would be error for the Civil Aeronautics Board to assume any such power under a statute which does *not* contain express provision for compulsory extension.

10. It is doubtless because of considerations such as these that the Board seems to have itself recognized that existing law does not authorize it to make any such order as is here proposed. Two months after the initiation of this proceeding, the Board requested such power, stating in its Third Annual Report to Congress, dated November 14, 1942 (p. 15):

> *"Power to Initiate New Routes.—The Act does not now give to the Board power to initiate the establishment of new routes for air transportation services where applications therefor are not first filed by private individuals or companies, although the Board*

has power under section 401(h) of the Act to require 'amendments' to certificates on its own initiative, without application by the carrier, after notice and hearing. The word 'amendment' is vague and carries with it a limited concept. Consequently it has been argued that the Act now appears to contemplate that the Board shall await the filing of applications in order to authorize any substantial new service. If the Board is to develop air transportation in such a
107 manner as to keep pace with the requirements of national defense and our general national interests, it must be given the power to institute proceedings upon its own initiative for the purpose of determining that particular routes not then in operation should be established. The existence of such a power in the Board is particularly important with respect to international routes. Section 401(n) authorizes the Postmaster General to certify to the Board that new routes are required for the transportation of mail. Congress, therefore, has already decided that it is sound policy to provide for a power in the Government to initiate proceedings with respect to the
108 establishment of new mail routes, and the need is equally clear for such a power with respect to the establishing of all new routes." (Italics supplied.)

A similar statement was made by Chairman Pogue before the House Committee on Interstate and Foreign Commerce on February 2, 1943 (Hearings on H. R. 1012, pp. 44-45).

11. The Board itself has thus stated that "the Act does not now give to the Board power to initiate the establishment of new routes for air transportation services where applications therefor are not first filed by individuals or companies." The impact of this pronouncement cannot be avoided by calling an operation of 1200 miles through the

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Caribbean between the Canal and the United States a mere "extension" of an existing route in South America. As held in the *Oregon-Washington* case, even express power to order a carrier "to extend its line or lines" would not comprehend a route of such magnitude and character. Still less can the operation of such a route be compelled under a mere power to "amend," a word which, as the Board so well stated, "is vague and carries with it a limited concept."

12. Congress has not as yet seen fit to give to the Board the increased power for which it asked. Amendatory 110
legislation is still before the respective Committees of the House of Representatives and of the Senate. It would hardly be suggested that the Board should proceed with this hearing on the basis of mere expectation that Congress may make the necessary grant of power before the date for decision is reached.

III.

The Hearing Should be Adjourned Until This Question of Jurisdiction is Determined.

111

The petitioner believes that it would be manifestly contrary to the public interest for the Board to proceed with the hearings herein, if, as petitioner believes, the Board must ultimately decide that under existing law it is without legal power to take action. The volume of exhibits already on file and the broad scope of the issues show that these hearings will last for many weeks. All of the companies involved in this case, as well as the Board's staff, are deeply engaged in the war effort. The Board should be interested in preventing the useless expenditure of time, money and man-power and the unnecessary public controversy between the two largest American transportation enterprises in Latin America, which will be entailed if, after hearings have been held, the Board should ultimately determine that

it is without power to make an order herein, as the petitioner believes it necessarily will do.

The petitioner has withheld the filing of this motion because of the possibility that Congressional action might change the legal situation. However, with the hearing now set to commence and with Congress not having yet seen fit to make the requested enlargement in the Board's powers, petitioner has felt bound to file this motion.

WHEREFORE, your petitioner respectfully prays that the Board make an order dismissing this proceeding because of the Board's lack of legal power under existing law to take action herein and as beyond the jurisdiction of the Board. Your petitioner further prays that the Board hear oral argument on this motion and that, pending such argument and the determination to be made thereon, the Board should adjourn the hearings herein.

Dated, September 14, 1943.

Respectfully submitted,

PAN AMERICAN AIRWAYS CORPORATION,

By ROOT, CLARK, BUCKNER & BALLANTINE,
Its Attorneys.

HENRY J. FRIENDLY,
CHARLES C. MACLEAN, JR.,
J. P. KRANZ, JR.,
J. H. HAMSTRA,
Of Counsel.

Cross Motion of W. R. Grace & Co. 115

BEFORE THE

CIVIL AERONAUTICS BOARD

IN THE MATTER *of* The alteration, amendment and modification of the certificate of public convenience and necessity of PAN AMERICAN-GRACE AIRWAYS, INC. under section 401(h) of the Civil Aeronautics Act of 1938, as amended, to provide for a route terminal in the United States.	Docket No. 779. 116

Communications with respect to this motion should be addressed to

WRIGHT, GORDON, ZACHRY, PARLIN & CAHILL,
Attorneys for W. R. Grace & Co., 117
Office and Post Office Address,
63 Wall Street,
New York 5, New York.

JOHN T. CAHILL,
FRED J. KNAUER,
Of Counsel.

118 *Cross Motion of W. R. Grace & Co.*

BEFORE THE

CIVIL AERONAUTICS BOARD

IN THE MATTER *of* The alteration, amendment and modification of the certificate of public convenience and necessity of 119 PAN AMERICAN-GRACE AIRWAYS, INC. under section 401(h) of the Civil Aeronautics Act of 1938, as amended, to provide for a route terminal in the United States.	Docket No. 779.

Now comes your petitioner, W. R. Grace & Co., and moves that the Board defer oral argument on and consideration of the motion of Pan American Airways Corporation to dismiss this proceeding for want of jurisdiction
120 until the final argument upon the merits, subsequent to the filing of the Examiners' report. For the grounds of such motion it represents as follows:

1. Your petitioner is, and since the organization of Pan American-Grace Airways, Inc. has been, the owner of half of the capital stock of said Pan American-Grace Airways, Inc., known as Panagra. Your petitioner was made a party to this proceeding by the order of the Civil Aeronautics Board dated September 10, 1942, which instituted this proceeding to determine whether Panagra's route should be extended to a terminal in the United States.

2. On September 15, 1943 Pan American Airways Corporation filed a motion to dismiss this proceeding for want

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of jurisdiction. This motion was denied by the Civil Aeronautics Board on or about September 23, 1943 by Order No. 2448 without prejudice to its renewal after the hearings.

3. Thereafter, on October 23, 1943, at the close of the six weeks of hearings in this Proceeding, Pan American Airways Corporation renewed its motion to dismiss.

4. On November 24, 1943 counsel for W. R. Grace & Co. was informed that the Civil Aeronautics Board would hear oral argument on the motion of Pan American Airways Corporation. 122

5. Petitioner believes that the previous denial of the motion of Pan American Airways Corporation prior to the hearings indicates that the Board desired to have the benefit of having the entire record before it in passing upon the question of jurisdiction. That question, particularly if the constitutional issue is raised as is indicated in the motion of Pan American Airways Corporation, involves a consideration of numerous issues of fact. These include, among others, the nature of the route and service proposed, the traffic available on this route, and revenue and expense which would result from operation of this route, the amount 123 of capital expenditure required, the ability of the carrier to make such expenditure, etc. Indeed, Pan American Airways Corporation, according to its motion papers, apparently seeks to inject into its motion to dismiss the entire question of the alleged limitation upon the scope of Panagra's corporate powers, which issue consumed a very large part of the six weeks of hearing and covers a great portion of the voluminous record.

6. The motion to dismiss, therefore, requires a thorough study and briefing of the facts. This task should not have to be undertaken twice. The study of the relevant portions of the record, and the preparation of the briefs and argu-

124 ment on the jurisdictional question at this time would involve a considerable duplication of the work and effort necessary for the presentation of this case upon the merits in the final briefs and arguments.

7. Postponement of the consideration of the jurisdictional issue until the final determination of the entire case upon the merits would also give the Board the benefit of any amendatory legislation which might be passed in the interim.

125 8. Petitioner believes, therefore, that the expenditure of considerable time and effort, the duplication of work, and the consideration of a question which may well become moot, can be avoided by deferring argument upon the question of jurisdiction and joining this question with the merits for consideration upon the final briefs and argument following the Examiners' report.

WHEREFORE, your petitioner respectfully prays that the Board make an order deferring consideration of the jurisdictional question and joining the same with the merits and deferring argument upon the jurisdictional question until
126 the final argument of the case upon the merits.

Dated, December 2, 1943.

Respectfully submitted,

W. R. GRACE & Co.

By WRIGHT, GORDON, ZACHRY, PARLIN & CAHILL,
Its Attorneys.

JOHN T. CAHILL,
FRED J. KNAUER,
Of Counsel.

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Correspondence re Scope of Motion and Argument.

Letter of Root, Clark, Buckner & Ballantine.

(Letterhead of)

ROOT, CLARK, BUCKNER & BALLANTINE
31 Nassau Street
New York 5

December 3, 1943

C. Edward Leasure, Esq.,
Chief Examiner,
Civil Aeronautics Board,
Washington 25, D. C.

128

Dear Sir:

Re Docket No. 779

We have received today a copy of the "Cross Motion of W. R. Grace & Co." requesting that the Board "make an order deferring consideration of the jurisdictional question and joining the same with the merits and deferring argument upon the jurisdictional question until the final argument of the case upon the merits."

We were informed on November 24, 1943, that the Board had determined to hear oral argument on the jurisdictional question before the parties were required to file briefs with the Examiner upon the merits. The "Cross Motion of W. R. Grace & Co." is thus, in reality, a motion for reconsideration of this determination.

129

The motion states that:

> "Petitioner believes that the previous denial of the motion of Pan American Airways Corporation prior to the hearings indicates that the Board desired to have the benefit of having the entire record before it in passing upon the question of jurisdiction."

The Board is surely in a much better position than any of the parties to know why it made its order of September 23, 1943, with respect to the motion to dismiss, and apparently

it does not regard this action as in any way inconsistent with its present decision to hear oral argument on the jurisdictional question before requiring the parties to brief the merits. Moreover, it is significant that the Board's order of September 23, 1943, denied the motion "without prejudice to its renewal *at the close of the hearing* in said proceeding", and not "without prejudice to its renewal *after* the hearing", as stated in the Cross Motion of W. R. Grace & Co. (par. 2).

The jurisdictional question is a simple question of statu-
131 tory construction, namely, whether Congress did or did not empower the Board to require an air carrier to make a substantial addition to its operations. Decision of that issue of law does not require the tedious searching of the record portrayed in paragraph 5 of the Cross Motion. That a route from the Canal Zone to the continental United States, some 1,200 miles in length, would be a substantial addition to the operations of Pan American-Grace Airways, is not, we assume, disputed. Determination of the question of statutory construction presented by the motion to dismiss will not require the Board to examine into the details of the estimates as to capital expenditures, traffic, revenues and expense. Counsel for Grace appear to have confused
132 the question whether Congress conferred power upon the Board to take the action *of the general sort* here under consideration, which is presented by the motion to dismiss, with a different question, namely, whether even if the general power had been and could constitutionally be granted, the taking of such action *in a particular case* would not, on the facts there presented, constitute a deprivation of property without due process of law.

As at present advised, we do not believe that the question of the agreement between Pan American Airways and W. R. Grace & Co. at the time of the organization of Pan American-Grace Airways with respect to the scope of that company's operations forms an essential part of the argument. However, even if the parties were required to brief

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this question at the present time, the work involved would be only a small fraction of the labor required for a complete brief on the merits, which must include such issues as general questions of public convenience and necessity, the adequacy of the connecting service, the "fourth trip" controversy, the Camaguey stop, the general effect of Section 408 of the Act, Grace's contention that Section 408 is not applicable here, Pan American's claims of demonstrated evil effects of the steamship connection, questions relating to the nature of W. R. Grace & Co. and the extent of its activities, and others too numerous to mention here.

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Little need be said as to the suggestion in paragraph 7 of the motion that:

> "Postponement of the consideration of the jurisdictional issue until the final determination of the entire case upon the merits would also give the Board the benefit of any amendatory legislation which might be passed in the interim."

Apart from legal questions, certainly the Board would not wish to put itself in the position of continuing with this proceeding on the basis of a hope of enactment of amendatory legislation if it is convinced that the power proposed to be exercised is one which the Congress has not yet conferred.

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Respectfully yours,

ROOT, CLARK, BUCKNER & BALLANTINE

Root, Clark, Buckner & Ballantine,
Attorneys for Pan American Airways Corporation

HENRY J. FRIENDLY
J. P. KRANZ, JR.
Of counsel

Copies to all parties of record.

136 *Correspondence re Scope of Motion and Argument.*

Letter of Gambrell & White.

(Letterhead of)

GAMBRELL & WHITE
Suite 825 The Citizens & Southern Bank Bldg.
Atlanta, Ga.

December 27, 1943

Civil Aeronautics Board
Washington, D. C.

137

Dear Sirs:

In re: Docket 779

We have received copies of the Board's order of December 17, 1943 denying the "cross motion" of W. R. Grace & Company, and the letter of Mr. Leasure dated December 17, 1943 setting the time for oral argument and the filing of briefs with respect to the motion to dismiss the proceeding under Docket 779.

The Board's order and Mr. Leasure's letter speak of the "motion of Pan American Airways Corporation to dismiss the proceeding in Docket No. 779." We assume that the
138 Board is not overlooking the motion to dismiss filed by Eastern Air Lines on October 21, 1943, and that the Board desires argument and brief with respect to all grounds for dismissal of the proceeding. It is therefore our plan, unless otherwise advised by the Board, to file brief and to present oral argument on all of the grounds stated in Eastern's motion to dismiss, namely:

> "1. It is clear from all of the pleadings and evidence that Panagra in the circumstances is not fit, willing and able to perform the service under consideration in this proceeding, that the public convenience and necessity do not require such service by Panagra, and that the authorization of such service by Panagra would be contrary to law and the public interest.

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"2. The Board lacks legal power to grant authorization to Panagra without first giving full hearing and consideration to the application of Eastern under Docket 782, as required by the Act of 1938 and the Constitution of the United States.

"3. The Board lacks power to grant a new route to Panagra for which Panagra has not applied.

"4. The Board cannot legally grant a new route to Panagra because it is controlled by a surface transportation company which has made no attempt to show and cannot show that it can use aircraft to public advantage in its operation and will not restrain competition.

"5. The Board cannot legally grant the route to Panagra because control of that carrier by either Pan American, W. R. Grace & Co. or both would prevent rather than promote 'the sound development of an air transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense.'"

Each of the foregoing grounds challenges the jurisdiction or power of the Board to act in the proceeding under Docket 779. Ground No. 3 denies the Board's basic jurisdiction of a new route proceeding in which no application has been filed.

Ground No. 2 challenges the Board's jurisdiction to proceed under Docket 779, even assuming basic jurisdiction of a proceeding of this type, without granting to Eastern full hearing and consideration of its timely application to provide service over the very route under consideration in Docket 779. It is a well settled principle of law that a court or administrative agency may lose "jurisdiction to proceed", even though it had jurisdiction originally, by denying

due process of law to those who are or should be parties to the proceeding. See for example, *Johnson* v. *Zerbst*, 304 U. S. 458 (1938).

Grounds Nos. 1, 4 and 5 challenge the power of the Board to grant the authorization apparently under consideration in Docket 779. It is Eastern's plan to show that, *on the pleadings alone*, it can be determined that the Board has no power to grant an authorization to Panagra under Docket 779. Furthermore, since motion to dismiss is being considered after the hearing, Eastern plans to point out,
143 without detailed reference to the record, that the evidence is in accordance with the pleadings, demonstrating that the Board lacks power to grant authorization to Panagra in this proceeding.

The motion of Pan American Airways sets forth only one of these grounds for dismissal. Pan American has been granted one hour in which to present its oral argument in support of its one ground for dismissal. Inasmuch as Eastern wishes to present argument on *five* grounds for dismissal, Eastern respectfully requests that it be given at least one hour for such argument.

Very truly yours,

144

GAMBRELL & WHITE
Attorneys for Eastern Air Lines, Inc.

By (Sgd) E. SMYTHE GAMBRELL

E. SMYTHE GAMBRELL

Copies to all parties.

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Letter of Root, Clark, Buckner & Ballantine.

(Letterhead of)

ROOT, CLARK, BUCKNER & BALLANTINE,
31 Nassau Street
New York 5

January 3, 1944

C. Edward Leasure, Esq.,
Civil Aeronautics Board,
Washington 25, D. C. 146

Dear Sir:

Re: *Docket No. 779*

We have received a copy of the letter of counsel for Eastern Air Lines dated December 27, 1943 stating that it is their plan, unless otherwise advised by the Board, to file brief and present oral argument on five different grounds stated in the motion to dismiss filed by Eastern Air Lines on October 21, 1943.

It has been our understanding that the motion set for oral argument by the Board was not the motion of Eastern Air Lines but the motion of Pan American Airways Corporation to dismiss the proceeding on jurisdictional grounds; that Eastern was being accorded an opportunity to participate in the argument because the third ground of its motion was similar to the ground advanced in Pan American's motion; but that the Board did not intend to hear argument at this time on the other grounds advanced in Eastern's motion. 147

On behalf of Pan American Airways Corporation, we object to any such broadening of the argument to be heard at this time as is indicated in the letter of counsel for Eastern. Any such course would inevitably lead to extended discussion of the very large record in this docket. This would be premature at this time. Moreover, if considera-

148 *Correspondence re Scope of Motion and Argument.*

tion of the record ever becomes necessary, the Board should have the advantages of a report by the examiners and of much more extensive brief and argument than is contemplated for the argument on the motion to dismiss.

Very truly yours,

ROOT, CLARK, BUCKNER & BALLANTINE,
Attorneys for Pan American Airways Corporation,

By (Sgd) HENRY J. FRIENDLY

149

HENRY J. FRIENDLY

Copies to all parties.

Telegram from Chief Examiner of Civil Aeronautics Board.

WESTERN UNION

Received 1944 Jan 8 PM 4:14

150

WASHINGTON DC 8 3:38 P

JOHN T CAHILL

63 WALL ST (NEW YORK NY)

RE ISSUES BRIEFS AND ARGUMENT DOCKET 779 JANUARY 31, 1944. BOARD ASSIGNED ARGUMENT PAN AMERICANS MOTION TO DISMISS LACK OF JURISDICTION. ISSUE RESTRICTED TO THAT POINT. PARTICIPATION OF INTERVENERS PERMITTED IN SUPPORT THEREOF. NO ACTION YET ON OTHER MOTIONS TO DISMISS

C EDWARD LEASURE CHIEF EXAMINER

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Excerpt From Pan American's Brief Before the Civil Aeronautics Board on Motion to Dismiss, Dated January 14, 1944, Page 4, Line 16 to Page 5, Line 4, Inclusive. 151

Pan American's motion to dismiss raises a question as to the construction of a few words in Section 401(h) of the Civil Aeronautics Act, as applied to facts which are beyond dispute. While we are confident that no fair consideration of the detailed evidence of record could leave the slightest doubt that definite agreements as to the territory in which Pan American-Grace was to operate were made between the parties before the company was organized and were confirmed as recently as the "settlement" agreement of 152
February 14, 1939 (Ex. P-35, p. 16), we do not consider this essential to showing the Board's lack of jurisdiction; and, in the interest of simplifying the present argument and avoiding any necessity for detailed analysis of the evidence, we have therefore omitted discussion of these agreements from our brief and argument on the present motion. The various charges and countercharges which occupy so many pages of the voluminous record are still more clearly irrelevant to the issue here presented for determination.

Our argument will be devoted to a single proposition of law,—namely, that the Civil Aeronautics Act, as it presently exists, does not authorize the Board to require an air 153
carrier to extend its lines into a general area not theretofore served by it, and that therefore the Board is without jurisdiction herein.

Excerpt From C. A. B. Public Counsel's Brief Before the Civil Aeronautics Board on Motion to Dismiss, Dated January 15, 1944. 4 Complete Paragraphs on Page 2.

Before proceeding to the discussion of the statute and the decided cases, it will be well to define the scope of the question under consideration. In addition to the ultimate issue of whether or not public convenience and necessity require the extension of the route to Miami, the following two issues are presented:

1. *The statutory problem.* What is the meaning of the statute? Does it authorize extensions of a route, and if so, what kind of extensions. (For example, does it empower the Board to make extensions which are within the scope of the carrier's undertaking; or does it empower the Board to make extensions which, although they are beyond the scope of the carrier's undertaking, are reasonable extensions and therefore not a deprivation of property without due process of law?)

2. *The problem of application.* If the statute does empower the Board to order certain extensions, do the facts of this case show that this particular extension is one of the type which the Board has power to require?

The first issue is purely one of *construction* of the statute; the second is one of *application* of the statute to the facts of the case. It is the purpose of this brief to treat only with the first issue—the statutory problem. It is not the purpose of this brief to consider whether this particular extension from the Canal Zone to Miami is one of the type of extensions permitted by the statute because, in the opinion of Public Counsel and for the reasons set forth hereinafter, this problem would require determination of the constitutional question of deprivation of property without just compensation or due process of law. Such a question cannot properly be determined without consideration of the entire record and in a manner coextensive with examination

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of the merits of the case. Nor can it be argued or determined specifically until the final order of the Board is known.

Excerpts from Oral Argument Before the Civil Aeronautics Board on Motion to Dismiss, January 31, 1944.

ARGUMENT BY MR. FRIENDLY (Pan American)

S. M., page 5, lines 7 to 16 (R.* 8412):

Mr. Friendly: If the Board please, I think this is a somewhat novel occasion, the first time that I can remember that 158
I have had the privilege of appearing before you to argue what I believe is called a pure question of law. That question is whether the Board has power, as said in your Show Cause Order, to authorize and require an air carrier to engage in a new operation 1,200 miles long in an area never previously served by it, and which the carrier has not requested authorization to serve.

S. M., pages 27-29 (R. 8434-6)

Now, the first of those arguments makes it desirable to emphasize an important distinction that is referred to in the conclusion portion of our brief. There are two possible 159
bases on which a compulsory extension order might be attacked on constitutional grounds. Of course, such an order would be subject to attack, whatever the other situations might be, if in a particular case it could be demonstrated that the financial results of the extension order would be confiscatory, and where the attack was on that ground there would naturally have to be a thorough investigation of the amount of the investment required, and the financial prospects, and all these differences between air transportation and other forms of transportation would be of weight. But that is not the ground of attack to which the Supreme Court referred in the Oregon case, and for a very

* "R" refers to the pages of the complete record as renumbered by the Civil Aeronautics Board.

good reason. The Interstate Commerce Commission had found that—had found in that case that the extension would prove a remunerative investment, and the Court held this finding to be supported by evidence, and, therefore, conclusive upon it, and I assume, contrary to some intimations in the briefs, that when the Supreme Court of the United States says that it holds a finding to be conclusive upon it, it means exactly that. The constitutional doubts to which the Court referred, were of an entirely different sort. They were founded upon the principle that a railroad was the
161 property of its proprietors, and that to require extensions beyond the scope of its commitment to the public service, was a taking of property prohibited by the Federal Constitution, however bright the financial prospects might be claimed to be, and that principle applies to air transportation exactly as to anything else.

For that reason all of the pages of argument as to capital costs and the relation of capital costs to revenues, and the possibility of salvaging some of the capital if the operation turns out badly, and the prospects for recouping losses out of subsidies, all seems to me to be irrelevant.

The other constitutional argument is an attempt to show that the Court was mistaken in thinking that constitutional
162 doubts, in fact, existed. It is claimed that the Court erred in believing these earlier decisions to have held that due process was denied when service beyond the undertaking of the carrier was required, and it is said that the only rule that ought to exist or, in fact, did exist, was some general requirement of reasonableness, and the cases are put through a kind of centrifuge, out of which a few emerge which are said to hold that contrary to the Court's statement, reasonable extensions have been upheld even though they were not within the undertaking of the carrier.

Now, actually all those cases were decided, as far as I can find, before the Oregon case, most of them were cited in the Court's opinion or in the briefs, an examination of them shows that the orders were within the scope of the

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carrier's undertaking, and where the Courts did not expressly state this as they usually did, the facts were so plain as to make statement unnecessary. But this discussion also is really beside the point.

The question now before the Board is not what the Supreme Court might ultimately decide on the constitutional issue, if that issue were to be squarely presented to it, but simply a question of statutory construction. The construction of the Act depends on the existence of grave constitutional doubts, not on their ultimate solution, and with the Supreme Court of the United States stating that such doubts exist this Board, to my mind, is hardly in a 164
position to say that they do not. Indeed, the fact is that there can hardly ever have been a case where this rule of construing to avoid constitutional doubts has the force that it does in this one. Normally the doubts arise either from general principles or decisions of lower courts on the same point or of the Supreme Court on analogous points or a combination of those, but here we have a decision of the Supreme Court on the precise question and still more unusual we have a decision of the Supreme Court known to Congress, when this very Act was in process of enactment, so that if Congress had wished to heed the Court's warning and make itself clear, it could easily have done so. 165
Because of this and the other considerations that I have mentioned, we think that the Board should not by blind adherence to an alleged dictionary meaning, take upon itself a power which Congress has shown every intention not to grant.

ARGUMENT BY MR. WANNER, PUBLIC COUNSEL

S. M., page 107 (R. 8514)

Mr. Wanner: The problem before the Board today is one of statutory construction. I want to make it clear at the outset that I want to discuss the general problem of statu-

tory construction, rather than the specific application of the statute to Panagra.

S. M., page 137, lines 14 to 27 (R. 8544)

Mr. Warner [Board Member]: Mr. Wanner, the subject of jurisdiction has so far been argued in very broad terms with little reference to the fact of this particular case. I wondered whether you felt that there was anything in the facts of this case that set it aside jurisdictionally from what might be a more typical instance, the more typical
167 instance perhaps being that of a more active unwillingness as compared with a perhaps passing unwillingness that results in this case from an internal deadlock?

Mr. Wanner: As I have stated, I am not particularly prepared to talk on that, for the reason that it involves an examination of the entire transcript, and there are many implications to be drawn from the transcript and from the record. • • •

S. M., page 141, lines 5 to 9 (R. 8548):

Mr. Ryan [Board Member]: Let's forget about the facts of this particular case. We are talking about, as you*
168 pointed out in the beginning of your argument the fundamental principle of whether Congress has granted us this power, not its application to this particular case. • • •

* The word "you" is erroneously recorded in the transcript as "I".

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Petition of W. R. Grace & Co. for Reargument and Reconsideration.

BEFORE THE

CIVIL AERONAUTICS BOARD

IN THE MATTER *of* The alteration, amendment and modification of the certificate of public convenience and necessity of PAN AMERICAN-GRACE AIRWAYS, INC. under section 401(h) of the Civil Aeronautics Act of 1938, as amended, to provide for a route terminal in the United States.	Docket No. 779.

WRIGHT, GORDON, ZACHRY, PARLIN & CAHILL,
Attorneys for W. R. Grace & Co.

Of Counsel:

JOHN T. CAHILL,
FRED J. KNAUER,
ELMER J. KELSEY,
WILLIAM F. KENNEDY.

172 *Petition of W. R. Grace & Co., for Reargument and Reconsideration.*

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TO THE CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

NOW COMES W. R. Grace & Co. and respectfully petitions
174 the Board for reargument and reconsideration of its Opinion and Order No. 2867 dated May 24, 1944, granting the motion of Pan American Airways to dismiss this proceeding for lack of jurisdiction and dismissing said proceeding, Docket No. 779.

SPECIFICATION OF ERRORS.

In support of this petition, W. R. Grace & Co. respectfully avers that the Civil Aeronautics Board, in its action aforesaid, erred in the following respects:

I. The Board erred in deciding, upon the facts mentioned in its opinion, that the proposed Panagra extension is *per se* unreasonable and beyond the Board's power.

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II. The Board erred in ruling upon the application of its power to this particular extension, a question not before the Board on this argument.

III. The Board erred in taking into consideration as bearing on its jurisdiction under Section 401(h) of the Act any controversy between the co-owners of Panagra.

I.

THE BOARD ERRED IN DECIDING, UPON THE FACTS MENTIONED IN ITS OPINION, THAT THE PROPOSED PANAGRA EXTENSION IS *per se* UNREASONABLE AND BEYOND THE BOARD'S POWER. 176

The heart of the Board's decision, as we understand it, is simply this:

1. That the Board has full power, by amendment of a carrier's certificate under Section 401(h) "upon its own initiative" to extend a carrier's route.

2. That this power exists, however, where the Board is acting on its own initiative, only in case they find the proposed extension to be reasonable; that, under Justice Cardozo's opinion in the *Oregon* case*, such an extension will not be considered reasonable where the extension is "so vast and sudden as to work an utter transformation of the character of the road, making what was extended the incident and the extension the principal". 177

We are not, for the purpose of this petition for reconsideration, contesting the Board's interpretation of the statute. For the present purpose, but without prejudice, we accept this interpretation. We maintain, however, that this interpretation makes impossible a dismissal of this

* *Interstate Commerce Commission* v. *Oregon-Washington Railroad & Navigation Co.*, 288 U. S. 14 (1933), herein referred to as the *Oregon* case.

178 proceeding on this motion. For so interpreted the statute can only be applied after an examination of the facts. Reasonableness in its very essence involves a consideration of all the relevant facts.

Thus, as the Supreme Court said in *Chicago & Northwestern Railway Company* v. *Ochs*, 249 U. S. 416, 421 (1919) in holding that the Warehouse Commission of Minnesota could compel a railroad company to extend a track:

> "Of course, the expense is an important element
179 to be considered in determining whether the requirement is within the bounds of reasonable regulation or is essentially arbitrary, but it is not the only one. The nature and volume of the business to be affected, the revenue to be derived from it, the character of the facility required, the need for it and the advantage to be realized by shippers and the public are also to be considered. Tested by these criteria we think the order in question is not arbitrary, but reasonable."

Or, as the court phrased it in *Sussex Land & Live Stock*
180 *Co.* v. *Midwest Refining Co.*, 294 Fed. 597, 602-3 (C. C. A. 8th, 1923):

> "What is 'reasonable' depends upon a variety of considerations and circumstances."

None of the facts mentioned by the Board in and of themselves and without relation to the whole record can possibly constitute unreasonableness *per se* and as a matter of law.

The reasonableness or unreasonableness of this particular extension and the question whether it is "so vast and sudden as to work an utter transformation of the character of the road, making what was extended the incident and the extension the principal" are purely and entirely questions of fact and can only be decided in the light of all of the evidence in the record in Docket 779.

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The Board quoted as its guiding principle an extract from Justice Cardozo's opinion that

> "The action of the Commission must have a *basis in reason*, and its order must be viewed with reference to the length and other conditions of the line or lines to be enlarged." (Italics added.)

To consider whether the particular extension has "a basis in reason", and to consider the "other conditions", obviously requires an analysis of the entire record and a 182
thorough examination of all the evidence.

The Board recognizes this because, after stating the principles of its decision, it then "on the basis of these principles • • • turn[s] to the consideration of the extension of Panagra's system to a terminal point in the United States" (Opinion, p. 10). It proceeds to hold that such an extension is unreasonable, "in the light of the conditions surrounding the extension here involved • • •" because

> (a) The extension would increase route mileage by about 1,200 miles or 14%.
>
> (b) The extension would require a capital investment of about $800,000, as against gross assets of 183
> $10,700,000 at the end of 1942.
>
> (c) The extension would give the carrier direct access to gateways in the United States, and would permit it to connect directly with the domestic air transportation system of the United States, without the necessity of relying on a connecting carrier.

In summary, the Board says that while length of mileage of the new service and additional investment have been factors in reaching this conclusion, "the principal consideration" is that by eliminating Panagra's dependence on a connecting carrier between the Canal Zone and the United

184 States the extension "would constitute a basic transformation of the character of the carrier."

It is respectfully submitted that none of these considerations in and of themselves constitute unreasonableness *per se* and as matter of law. All of them involve questions of facts and cannot be decided as matters of law but only upon consideration of all of the evidence in the record. Twelve hundred miles or $800,000 are meaningless terms from the standpoint of reasonableness unless considered not merely
185 in the light of the few isolated items mentioned in the Opinion, but in the light of all the facts of the case. Whether or not an extension to the United States changes the "fundamental character" of Panagra's operations depends not only on the relation of this change to the few isolated factors mentioned in the Opinion but, as Justice Cardozo's opinion in the *Oregon* case indicates, on the relation of the change to all of the facts of the case.

The advantages to Panagra itself and to the public interest must be considered in arriving at a conclusion as to the reasonableness of the extension. The expenditure involved is relevant not only in relation to the company's net worth,
186 but also in relation to its prospective net earnings from the extension. The character and adequacy of the existing service between Miami and the Canal Zone is a factor. The length of the extension, not so much as an arbitrary number of miles, but in relation to the intervening terrain and in relation to the essential nature of air transport must be considered.

Every extension, of course, removes some previous dependence on a connecting service. But of vital bearing on whether or not the extension changes Panagra's essential character, is the nature and scope of Panagra's existing service and the character of its traffic, and the manner in which it has heretofore served traffic to and from the United States,—considered in detail and not merely in a sweeping generality.

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Finally, and of distinct importance among the circumstances which must be considered in ascertaining whether the proposed extension is reasonable and thus within the limitations of the Board's power, are the facts regarding the public interest: the development of an air transportation system properly adapted to the foreign commerce of the United States; the promotion of adequate and efficient service "without unjust discriminations, undue preferences or advantages or undue or destructive competitive practices" and with a view to providing "competition to the extent 188
necessary to assure the sound development of an air transportation system".

Certainly there is nothing in the few isolated facts referred to in the Opinion,* even accepting them at face value, which justifies the conclusion, as matter of law, that the proposed extension is *per se* "so *vast* and *sudden* as to work an *utter* transformation of the character" of the carrier, "making what was extended the *incident* and the extension the *principal.*" That the extension would change Panagra's essential character is but a conclusion which certainly cannot be adduced from the single fact on which the Board relies,—namely, that it frees Panagra of dependence on a connecting carrier. An examination of the full 189
facts will, we believe, show that the proposed extension will not change Panagra's fundamental character,—certainly not in any such sense as would make the proposed extension an unreasonable one. The very force and strength of the words used in Justice Cardozo's opinion in the *Oregon* case, on which the Board relies, indicate that strong factual proof and not mere inference from a few isolated facts, much less mere legal conclusion without hearing, briefing and

* In view of the requirement of Section 1005(f) of the Civil Aeronautics Act that the order set forth the findings of fact upon which it is based, and as a general reference to the whole record is insufficient, it must be concluded that these grounds are the only ones upon which the Board acted. *Saginaw Broadcasting Co.* v. *F. C. C.*, 96 F. (2d) 554, 557 (Ct. App. D. C., 1938), cert. denied 305 U. S. 613 (1938); see *Beaumont, S. L. & W. Ry.* v. *United States*, 282 U. S. 74, 86 (1930).

argument of all the facts is required before this rule in the *Oregon* case is to be applied.

The Board's interpretation in effect emasculates the very power which the Board found it had. Public policy dictates that the Board must have the power to order reasonable route extensions even when there is no application therefor by the carrier, particularly with respect to international routes. See e.g. 1942 *Annual Report of the Civil Aeronautics Board*, p. 15. If the mere fact that a carrier,
191 when extended, eliminates a connection and carries its traffic through is *ipso facto* to be considered such an "utter transformation" as to put the extension beyond the power of the Board, then the Board lacks power to act in *precisely those situations where its action is necessary.*

It stands to reason that the situations in which the Board would normally order the extension of a carrier are those where the extension would result in such advantages as elimination of a connecting service, or giving the carrier direct connections with other lines, or enabling it to carry its traffic through.*

Therefore, far from concluding that "It does not seem
192 reasonable to believe that Congress contemplated that such a change . . . should be compelled by Government order," we believe that Congress must have contemplated route extensions in exactly this type of case. In fact, if a proposed extension did *not* entail such advantages, the question might well be raised as to whether it was not unreasonable or unnecessary and thus beyond the Board's power!

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* The Board has frequently extolled the advantages of one-carrier through service. See Order Serial No. 2820, p. 3, and compare Order Serial No. 2699, p. 10; *Atlantic Seaboard* case, Docket 445 (1944).

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II.

THE BOARD ERRED IN RULING UPON THE APPLICATION OF ITS POWER TO THIS PARTICULAR EXTENSION, A QUESTION NOT BEFORE THE BOARD ON THIS ARGUMENT.

The question of the Board's jurisdiction involves two considerations:

First, the general question of statutory construction as to whether the Board has the power *in any case* to order a route extension for which no application has been made. This was the only question involved on this argument.

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Second, the Board having decided that it has such power only where such extension is reasonable, the question whether, under all the facts and circumstances of this particular case, the extension of Panagra's route to a United States terminal is reasonable, and thus within the scope of the Board's power. This question was not before the Board on this argument.

The action of the Board, in basing its decision upon this second consideration, was improper, in that it deprived the parties of their right to a full hearing on the facts, in which they could properly brief, argue and present to the Board the facts and arguments related to the second consideration —the application of the general rule to this particular extension.

195

The record is crystal clear that only the first of the above two considerations was being discussed before the Board on the recent argument of Pan American's motion.

Pan American's Motion

The motion made by Pan American at the opening of the hearing before the Examiners was not made on the basis of the entire record. At that time there was no record. The motion, when renewed by Pan American at the close of the hearings, was on the identical printed motion paper. This

motion raised the general question of statutory construction as to whether the Civil Aeronautics Act gave the Board any power at all under any circumstance to "require a carrier to operate in a different territory from that specified in its certificate" (p. 3).

Pan American contended that the Board had no such power. The Board has held that it has such power provided the extension is a reasonable one. Obviously then the next step should be to proceed to a hearing on the
197 record to determine whether this particular extension is reasonable or unreasonable.

Action of Board on W. R. Grace & Co.'s Cross Motion

Not only is this apparent from Pan American's motion, but it is emphasized by what transpired in relation to the cross motion of W. R. Grace & Co. A cross motion was made on December 2, 1943 on behalf of W. R. Grace & Co. to defer consideration of the motion of Pan American until the final argument on the merits, subsequent to the filing of the Examiners' report. This cross motion was made on the ground that the motion would involve a consideration of
198 issues of fact which would require a thorough study and briefing of the evidence.* Thus Grace suggested combining the two considerations involved in the entire jurisdictional question (*supra*, p. 8 [page 65 of this Appendix]).

But Grace's cross motion was *denied* by the Board's Order No. 2586, dated December 6, 1943. This ruling was error on the part of the Board, and the Board's recent decision serves to accentuate that error.

With reference to the cross motion of W. R. Grace & Co., counsel for Pan American had written a letter to the Chief

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* The cross motion stated:

"These include, among others, the nature of the route and service proposed, the traffic available on this route, the revenue and expense which would result from operation of this route, the amount of capital expenditure required, the ability of the carrier to make such expenditure, etc." (p .2)

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Examiner of the Civil Aeronautics Board, dated December 3, 1943, in which they stated as follows:

> "*The jurisdictional question is a simple question of statutory construction, namely, whether Congress did or did not empower the Board to require an air carrier to make a substantial addition to its operations. Decision of that issue of law does not require the tedious searching of the record portrayed in paragraph 5 of the Cross Motion.* • • • *Determination of the question of statutory construction presented by the motion to dismiss will not require the Board to examine into the details of the estimates as to capital expenditure, traffic, revenues and expense.* Counsel for Grace appear to have confused the question whether Congress conferred power upon the Board to take the action *of the general sort* here under consideration, which is presented by the motion to dismiss, with a different question, namely, whether even if the general power had been and could constitutionally be granted, the taking of such action *in a particular case* would not, on the facts there presented, constitute a deprivation of property without due process of law." (First italics ours.)

This statement leaves no doubt of the fact that Pan American by its motion was raising purely a general question of law and was not seeking a ruling upon the application of the law to the facts here.

Action of Board on Points Raised by Eastern Air Lines

The same conclusion is inescapable from the Board's action on points raised by Eastern Air Lines. During the course of the hearings a motion had also been made on behalf of Eastern Air Lines to dismiss the proceeding. Unlike the

motion of Pan American, Eastern's motion was in part based on the record and raised issues of fact.

In connection with the intention of the attorney for Eastern Air Lines, as revealed in his letter to the Board dated December 27, 1943, to argue the various points he had raised in his motion to dismiss, counsel for Pan American wrote a letter to the Board's Chief Examiner dated January 3, 1944, in which they stated as follows:

"On behalf of Pan American Airways Corpora-
203 tion, we object to any such broadening of the argument to be heard at this time as is indicated in the letter of counsel for Eastern. *Any such course would inevitably lead to extended discussion of the very large record in this docket. This would be premature at this time. Moreover, if consideration of the record ever becomes necessary, the Board should have the advantages of a report by the examiners and of much more extensive brief and argument than is contemplated for the argument on the motion to dismiss.*" (Italics ours)

204 Thereafter, by a telegram of the Board's Chief Examiner, dated January 8, 1944, the issues were restricted to Pan American's motion, and the points raised by Eastern were ruled out. This again shows that the motion was intended to be confined solely to the general legal point.

Briefs of the Parties

The briefs of the parties reveal a similar understanding of the issues raised by Pan American's motion to dismiss. For example, Pan American's brief states as follows:

"Our argument will be devoted to a single proposition of law,—namely, that the Civil Aeronautics Act, as it presently exists, does not authorize the Board to require *an air carrier* to extend its lines into

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a general area not theretofore served by it, and that *therefore* the Board is without jurisdiction herein." (pp. 4-5) (Italics ours)*

Similarly, Public Counsel's brief states:

"The first issue is purely one of *construction* of the statute; the second is one of *application* of the statute to the facts of the case. It is the purpose of this brief to treat only with the first issue—the statutory problem. *It is not the purpose of this brief to* 206 *consider whether this particular extension from the Canal Zone to Miami is one of the type of extensions permitted by the statute* * * *. Such a question cannot properly be determined without consideration of the entire record and in a manner coextensive with examination of the merits of the case.* Nor can it be argued or determined specifically until the final order of the Board is known." (p. 2) (Last italics ours)

In harmony with the disclaimers of Pan American and with the Board's rulings, W. R. Grace & Co. refrained from presenting an extensive analysis of the facts and evidence. 207 While its brief did refer to certain facts in the record in this case, that was done to meet the argument of unconstitutionality, which Pan American had indicated (Motion, p. 4) it would make, and to distinguish the *Oregon* case. (See Point II of the brief of W. R. Grace & Co., discussing the constitutional issue.) The few facts presented were only illustrative, and were by no means an exhaustive portrayal of the many facts in the record establishing the reasonable-

* Pan American's brief also says:
"* * * in the interest of simplifying the present argument and avoiding any necessity for detailed analysis of the evidence, we have therefore omitted discussion of these agreements from our brief and argument on the present motion. The various charges and countercharges which occupy so many pages of the voluminous record are still more clearly irrelevant to the issue here presented for determination." (p. 4)

ness of the proposed extension in the light of all the circumstances.*

Oral Argument

A similar understanding of the very limited question before the Board on this argument is revealed throughout the stenographic minutes of the oral argument:

For example, counsel for Pan American remarked that this was the first time " * * * I have had the privilege
209 of appearing before you to argue what I believed is called a pure question of law."** (S. M. p. 5)

Public Counsel, opening his argument before the Board, stated as follows:

> "The problem before the Board today is one of statutory construction. I want to make it clear at the outset that I want to discuss the general problem of statutory construction, rather than the specific application of the statute to Panagra." S. M. p. 107)***

Remarks made at the oral argument by members of
210 the Board likewise indicated an intention to confine the argument of the motion to the general legal principle without involving the application to this particular controversy.

For example, the following statement is made by Member Ryan in addressing Public Counsel:

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* Briefs analyzing the evidence frequently run between 100 and 200 pages in length. See, e.g., the briefs in Docket 445, *et al.*

** Cf. S. M. pp. 27-29 where counsel for Pan American limited the constitutional issue he was raising on this argument, and again emphasized that this motion raised "simply a question of statutory construction".

*** Cf. S. M. p. 137:

> "Mr. Warner: 'Mr. Wanner, the subject of jurisdiction has so far been argued in very broad terms with little reference to the fact of this particular case. I wondered whether you felt that there was anything in the facts of this case that set it aside jurisdictionally from what might be a more typical instance * * *?'
>
> "Mr. Wanner: 'As I have stated, I am not particularly prepared to talk on that, for the reason that it involves an examination of the entire transcript * * *'."

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> "Mr. Ryan: 'Let's forget about the facts of this particular case. We are talking about, as you† pointed out in the beginning of your argument, the fundamental principle of whether Congress has granted us this power, not its application to this particular case. * * *' " (S. M. p. 141)

It is thus apparent from the motion of Pan American itself; from the correspondence relating thereto; from the Board's earlier rulings on both the cross motion of W. R. Grace & Co. to defer consideration of the motion to dismiss, and on the efforts of Eastern to broaden the scope of the issues; from the briefs of the parties; and from the transcript of the oral argument, that it was understood that the only question under consideration was the general power of the Board under the Civil Aeronautics Act to compel any route extension at all.

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In view of Pan American's repeated disclaimers that its motion raised any question of fact or required any "searching of the record", or concerned the application of the general rule to this particular case, the opinion of the United States Supreme Court in the recent case of *Flournoy* v. *Wiener*, 321 U. S. 253 (decided Feb. 28, 1944) is most appropriate. That case involved two questions, and Chief Justice Stone, after pointing out that appellant had named only one of these as a point on which he intended to rely, and that because of the appellant's disclaimer appellees proceeded on argument and in briefs on the assumption that only one question was before the court, stated:

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> "But this question is not before us because appellant, by his statement of points to be relied on, has affirmatively excluded it from consideration on this appeal and has limited himself to the differ-

† The word "you" is erroneously recorded in the transcript as "I".

ent question arising under the Fifth Amendment. *In any case we ought not to consider it here because in reliance upon this declaration neither party has briefed or argued it in this Court. * * * it is not the habit of this Court to decide important constitutional questions which the parties have not presented, briefed or argued.*" (p. 261) (Italics ours)

We cannot bring ourselves to believe that in this important case the Board is willing to decide such involved factual issues before they have even been "presented, briefed or argued".

Although six weeks were devoted to the taking of testimony in this proceeding, resulting in a record of about 3,500 pages of testimony and 500 exhibits, at an enormous expense to all concerned, it cannot be denied that the parties have never been given an opportunity to present briefs and argue the matter on the facts and the Examiners have never made their report thereon.* Consequently any determination here based on the facts is a clear denial of the hearing to which the parties are entitled.

Prior to its opinion, the Board's position as to the limits of its power to require an extension was in doubt. As Public Counsel's brief stated, the question of the application of the statute to the facts of this case could not "be argued or determined specifically until the final order of the Board is known" (*supra*, p. 12). It would be improper and unfair not to permit the parties now to address themselves specifically to the application of the Board's general power to the extension proposed in this proceeding.

Petitioner is entitled under the Act to a fair and full hearing as to whether or not on the facts of this particular case an order compelling Panagra to extend its route

* The decision is currently interpreted as blocking consideration of the record. See *American Aviation*, June 15, 1944, p. 42.

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would be reasonable and thus within the scope of its power. *Morgan* v. *United States*, 298 U. S. 468 (1936); *Morgan* v. *United States*, 304 U. S. 1 (1938); *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U. S. 292 (1937).

In the first *Morgan* case, the court said:

> "There must be a full hearing. • • •
>
> "The 'hearing' is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given." (pp. 480-1)

218

Contrary to this principle, in the present case the Board has heard neither evidence nor argument on the evidence.

In the second *Morgan* case, Chief Justice Hughes wrote:

> "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one." (p. 18)

219

A fair hearing involves not only the right to submit all relevant evidence, *Donnelly Garment Co.* v. *National Labor Relations Board*, 123 F. (2d) 215 (C. C. A. 8th, 1941), but also the right to have that evidence considered and findings made thereon. *A. E. Staley Mfg. Co.* v. *Secretary of Agriculture*, 120 F. (2d) 258 (C. C. A. 7th, 1941).

220 *Petition of W. R. Grace & Co., for Reargument and Reconsideration.*

III.

THE BOARD ERRED IN TAKING INTO CONSIDERATION AS BEARING ON ITS JURISDICTION UNDER SECTION 401(H) OF THE ACT ANY CONTROVERSY BETWEEN THE CO-OWNERS OF PANAGRA.

Controversy between Panagra's stockholders cannot possibly have any bearing whatever on the legal question of the jurisdiction of the Civil Aeronautics Board under the provisions of an Act of Congress,—the only question
221 under consideration.

We believe that an examination of the history of this company, as set forth in the record in this case, will show that the principal controversies between the owners of the company have been related to route extensions. A determination that the Board had power, on its own motion, to grant the route extension under discussion would, therefore, relieve not just "one particular controversy" but would in fact "solve the basic difficulties of the Panagra joint ownership". And the Board is surely not warranted in assuming that an exercise of this power by the granting of the extension, would be frustrated by disobedience to
222 the Board's order by any of the parties, or by lack of power in the Board in such contingency to implement its action by appropriate enforcement procedure. In such a contingency the Board would have at its disposal with which to compel compliance with its order:

(1) prosecution of a recalcitrant party, its officers and directors. Civil Aeronautics Act, Section 902(a).

(2) judicial enforcement of its orders. Civil Aeronautics Act, Section 1007(a).

Your petitioner begs to take exception, most respectfully but most emphatically, to the two last paragraphs of the

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Board's Opinion regarding the controversy between the owners of the company, and to the paragraph on page 4 summarizing the Board's explorations of the possibility of working out a settlement thereof. The evenly balanced language of these paragraphs, by which the Board seeks to maintain an impartial position respecting the matters under discussion, results quite unintentionally in an unjust reflection upon W. R. Grace & Co. Reference to "the special interests and the other activities of the co-owners" of course implies identity of position in these matters. The record shows that Pan American has in other connections, and in this very proceeding, supported interests in conflict with Panagra. But after most elaborate efforts to uncover something showing a similar situation with respect to W. R. Grace & Co. (searching through thousands of letters and documents in Panagra's files, bringing in an ex-Grace employee and resorting to every known form of inquisitorial research), only the most trivial and inconsequential evidence on this point could be produced by Pan American's counsel.

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The summary of the Board's efforts to effect a settlement between the parties also leaves W. R. Grace & Co. in a particularly unwarranted light. At a joint meeting of Grace and Pan American representatives held by the Board on October 28, 1942, the Board made the suggestion (to be effective for the duration) referred to in the Opinion, namely:

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> "* * * that the parties enter into an agreement under which sufficient shares of the two stockholders would be transferred to an independent public voting trustee or trustees to permit the election to the Panagra Board of an independent director or directors, or under which such an independent public director or directors might be otherwise appointed, who would

be able to break the deadlock resulting from the equal division of the ownership of Panagra stock between Pan American and Grace."

On this occasion W. R. Grace & Co., while expressing the feeling that a voting trust was unnecessary to accomplish the purpose, did agree to the designation of an independent director or directors as the Board proposed. Mr. Trippe, who was present representing Pan American, refused to agree to a voting trust or to an independent director unless
227 limitations were imposed on the jurisdiction of this director which would have the practical effect of largely, if not completely, destroying his effectiveness to accomplish the purpose which the Board had in mind. This meeting was the last communication of the Board with W. R. Grace & Co. on this subject. A contemporaneous statement of the position of the parties on this occasion is embodied in a letter addressed to the Board by W. R. Grace & Co. on the day of the meeting, reading as follows:

"We wish to confirm our position taken at this morning's conference.

228 "We accept your suggestion in principle and, for the duration of the war, agree to the immediate addition to Panagra's Board of an odd director (satisfactory to both stockholders) who might also serve as Chairman of the Board, with the understanding that this individual will be free to decide independently and without limitation, and on the basis of Panagra's being an independent entity, all matters involving Panagra's operations with regard to which the Pan American and Grace directors may be unable to agree. Such an arrangement accomplishes the same purpose as establishing a voting trust along the lines you suggested, while being less complicated and more easily put into effect.

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"For reasons pointed out this morning, the suggestion of Pan American that there be an odd director appointed, who would only have 'power to break any deadlock on any questions arising in connection with operations of the company *that fall within the scope of the dedication of capital made by the two stockholders'* begs the entire question. Grace and Pan American are not in agreement as to what is the proper scope of the company's operations, and fourteen years' experience has shown that such deadlocks as arise almost invariably revolve around this very issue which Pan American Airways wishes to exclude from the jurisdiction of the odd director."*

230

W. R. Grace & Co. has, at all times, been willing to carry out the proposal embodied in the above letter and now reiterates such willingness. W. R. Grace & Co. also offers, if the Board feels its proposal of an independent director may best be accomplished in that form, to enter into a voting trust agreement with Pan American in the precise tenor of the proposed agreement referred to on page 4 of the Opinion, or in such other reasonable form as the Board may deem best suited to accomplish its purpose.

231

Conclusion.

The Board has decided that its power under Section 401(h) of the Civil Aeronautics Act to extend a route "on its own initiative" exists where such extension is a reasonable one. Your petitioner respectfully prays that the Board do now proceed in regular manner to a consideration of the facts to determine whether or not the extension here involved is reasonable or unreasonable.

In view of the fact that the record is so extensive, and the jurisdictional facts are involved and for the most part

* October 28, 1942, Ex. G-75.

232 *Petition of W. R. Grace & Co., for Reargument and Reconsideration.*

coincide closely with the merits, this jurisdictional question should be joined with the merits. This is the accepted practice of the courts in such a situation.*

Your petitioner, therefore, submits that the Board should reverse its order, reinstate the proceeding, and remand the case to the Examiners for briefing and a report on the merits, combining with the merits a consideration of all the jurisdictional facts upon which it will determine whether the Panagra extension is reasonable in the light of all facts and circumstances, and thus within the jurisdiction of the
233 Board.

Dated: June 22, 1944.

Respectfully submitted,

W. R. GRACE & Co.
By W. G. HOLLOWAY
Vice-President.

WRIGHT, GORDON, ZACHRY, PARLIN & CAHILL,
Attorneys for W. R. Grace & Co.

JOHN T. CAHILL,
234 FRED J. KNAUER,
ELMER J. KELSEY,
WILLIAM F. KENNEDY,
Of Counsel.

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* See, for example, *Cyclopedia of Federal Practice* (2d ed., 1944) §4730; *Flournoy* v. *Wiener*, 321 U. S. 253 (1944); *Semple* v. *Hagar*, 71 U. S. 431, 433-4 (1866), where the court said:

> "But in many cases the question of jurisdiction is so involved with the other questions decided in the case, that this court cannot eliminate it without the examination of a voluminous record, and passing on the whole merits of the case. In such instances, the court will reserve the question of jurisdiction till the case is heard on the final argument on the merits."

In *York County Sav. Bank* v. *Abbot*, 131 Fed. 980 (C. C. Maine, 1904), the court, in deferring the jurisdictional question, said:

> "Not only is this the more convenient practice, but it protects against a hasty adjudication on a summary proceeding with reference to substantial questions." (p. 983)

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Petition of W. R. Grace & Co., for Reargument and Reconsideration. 235

VERIFICATION.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

W. G. HOLLOWAY, being duly sworn, deposes and says: that he is a Vice-President of W. R. Grace & Co.; that he has read and is familiar with the contents of the foregoing petition; that he intends and desires that in considering and acting upon said petition, the Board shall place full and 236
complete reliance upon the accuracy of each and every statement therein contained; that he is familiar with the facts therein set forth; and that, to the best of his information and belief, every statement contained in said petition is true and that no such statement is misleading.

W. G. HOLLOWAY.

Subscribed and sworn to before me this 22d day of June, 1944.

CATHERINE L. PURCELL,
Notary Public.

237

CATHERINE L. PURCELL,
Notary Public.
Kings Co. Clerk's No. 375, Reg. No. 138-P-5.
New York Co. Clerk's No. 323, Reg. No. 228-P-5.
Nassau Co. Clerk's No. 18-P-45.
Commission expires March 30, 1945.

CERTIFICATE OF SERVICE.

I HEREBY CERTIFY that I have this day served the foregoing petition upon all parties who appear of record in this proceeding by causing to be mailed a copy thereof, properly addressed, to the attorneys for each of such parties.

Dated: New York, N. Y., June 22, 1944.

FRED J. KNAUER.

238 **Excerpts from Transcript of Hearings Before Trial Examiners of the Civil Aeronautics Board, September-October 1943.**

Cross examination of Christopher De Groot.

S. M., page 49, line 22 to page 50, line 3 (R. 386-7):

Examiner Brown: Where do you get that figure of 4,800, Mr. Cahill?

Mr. Cahill: 400 per month.

Examiner Brown: I see.

The Witness: In my estimate under Item 20, I have esti-
239 mated that Panagra would carry approximately 3,750 passengers in each direction between Miami and Balboa. That is a number somewhat less than the current figure of Panagra traffic from Balboa south. The figures that I have named in my estimate in Item 20 I consider exceedingly conservative.

Cross examination of Gustavo Vidal.

S. M., page 452, lines 1-10 (R. 796):

Q. Is it possible that some of the capital expenditures estimated in that item might be saved by arranging for
240 joint use of existing facilities? A. I should think it would be possible if the joint facilities could be arranged.

Q. In that case, your investment for equipment would be somewhat smaller? A. Well, presumably we would pay rent in lieu of putting up a building or equipping the station ourselves.

S. M., page 453, line 16 to page 454, line 1 (R. 797-8):

Q. Item 31, Mr. Vidal. Is it your opinion that this additional operation can be undertaken without any increase in general burden expense? A. That is my present opinion on the basis of conversations with Mr. Campbell, Mr. Kirkland, and Mr. Shannon, Mr. Kirkland and Mr. Shannon

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being our vice presidents in South America with headquarters in Lima.

As was brought out in the testimony before, over a period of about six months we increased our frequencies in our present services from four trips a week to seven trips a week, which meant increase in mileage of well over a million miles a year, and we were able to take that in our stride. I think we are in a better position today to add mileage than we were then because we are starting from a higher mileage basis now.

242

Direct examination of Harold J. Roig.

S. M., page 792, lines 5 to 16 (R. 1142):

There is another point—I don't want to be too labored on this, but I think that in a sense we have rather flattered the nature of this service by calling it a connecting service. It is really sort of a shuttle service, sort of a third hinge. Little or none of our traffic originates or is destined to Miami. Not much of it originates or is destined to the Canal. Our traffic goes to various points in the United States which it reaches at Miami. The idea of injecting this shuttle service in between, while it may have served some useful purpose in the early days, has certainly long since been outgrown and it has become just a vermiform appendix.

243

S. M., page 796, line 12 to page 798, line 26 (R. 1146-8):

By Mr. Cahill:

Q. In 1933 Panagra was operating how many route miles, Mr. Roig? A. 4,425.

Q. And in 1942 how many were they operating? A. 8,800.

Q. In 1933, you were operating two round trips a week, were you not? A. Yes.

Q. In 1942? A. Seven and additional trips in some sectors.

Q. During the 10-year period available ton miles were increased by what percent? A. 355 percent.

Q. And ton miles used? A. 680 percent.

Q. What was your commercial revenue in 1933? A. $426,000. 21 percent of our total.

Q. In 1942? A. 4,788,000. 67 percent of the total. An increase of 1,022 percent.

Q. Now, passenger revenue increased what percentage during this period? A. 1,046 percent.

Q. Freight revenue? A. Express and freight revenue,
245 3,160 percent.

Q. Increase? A. Yes.

Q. Now, the company's investment in aircraft equipment and ground facilities in 1933 amounted to $955,000? A. That is right.

Q. In 1942, what did it amount to? A. $3,791,000.

Q. Now, what earnings did the company capitalize during this 10-year period? A. $2,850,000.

Q. And built up a surplus and miscellaneous reserve of? A. $399,000.

Q. And a self— A. And a self-insurance reserve of $1,201,000. Those figures are as of December 31, 1942.

Q. This company began business in 1929 with a million
246 dollar cash capital? A. That is right.

Q. By the end of 1942 it had cash and Government bonds of how much? A. $2,592,000.

Q. Total gross assets of how much? A. $10,754,000.

Q. And a net worth exclusive of goodwill? A. $3,990,000 exclusive of goodwill.

Q. Now, turning to— A. (Interposing) That also, of course, is exclusive of reserves for contingency of $360,000 and the self-insurance reserve which is all in cash or Government bonds of $1,200,000, so that those reserves amounted to over a million and a half.

Q. What is your opinion of this financial record of Panagra, Mr. Roig? A. I will compare it with that of any commercial airline in the United States.

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Excerpts from Transcript of Hearings Before Examiners. 247

Q. And where does it come out on that comparison? In your opinion, that is? A. Taking one thing with another, in my opinion, there isn't any airline that can match it.

Q. And do you think that this financial record is potent on the determination of the question of Panagra's ability to operate the proposed extension? A. I think it shows that we administer our business effectively and that we have the financial strength necessary to undertake the extension.

Direct Examination of Juan T. Trippe.

S. M., page 1738, lines 3 to 12 (R. 2103): 248

Q. If the Board were to order an extension of Pan American Grace's certificate to include an operation between the Canal Zone and Miami, and this should be placed in operation, what would be the effect upon Pan American's service between Miami and the Canal? A. It would be disastrous. In normal times the greater portion of the traffic carried by us on direct flights on our route between Miami and the Canal Zone was traffic destined for or originating at points on the routes of Pan American Grace.

MOTION BY MR. FRIENDLY.

249

S. M., page 3424, lines 2 to 15 (R. 3812):

Mr. Friendly: Yes, Mr. Examiner.

On the first day of this hearing I submitted a motion of Pan American Airways Corporation to dismiss this proceeding for want of jurisdiction on the ground therein stated.

Under date of September 23, 1943, the Civil Aeronautics Board made an order reading that the said motion be and is hereby denied without prejudice to its renewal at the close of the hearing in said proceeding.

I now renew that motion and I further request that that motion be heard and oral argument granted before any date is fixed for the filing of briefs herein.

Examiner Brown: Your motion will be referred to the Board, Mr. Friendly.

250

Exhibit PG-1.

(Furnished by Panagra.)

Item 1. (R. 4238)

Exhibit showing passenger traffic received by PANAGRA at CANAL ZONE. (a) from Pan American, (b) from all others—for the years 1938-1941.

	From Pan American	From all others
1938	459	113
1939	574	160
1940	1,008	236
1941	1,182	467

251

ITEM 3. (R. 4253)

Exhibit showing the number of passengers delivered by PANAGRA at the CANAL ZONE—(a) to PAN AMERICAN, (b) to ALL OTHERS by years (1938 to latest date available).

(for earlier years this data is not available)

	To Pan American	To all others
1938	475	158
1939	632	244
1940	1,117	296
1941	1,607	501

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253

Exhibit PG-4.

(Furnished by Panagra.)

Item 5 (R. 4750)

Statistics on Route Miles, Airplane Miles, Passenger and Mail Miles Flown [by Panagra], by Year 1929 to Date.

	Route Miles	Airplane Miles	U. S. Mail Miles	Passenger Miles
	(As at December 31)			
1929	4,463.0	241,217	241,217	395,370
1930	4,501.0	881,529	700,841	1,168,297
1931	4,545.5	1,050,608	943,420	1,824,974
1932	4,551.5	1,144,832	952,459	3,529,308
1933	4,551.5	1,162,394	984,243	4,508,720
1934	4,551.5	1,416,830	947,147	6,350,487
1935	4,497.1	1,447,856	944,873	7,588,288
1936	4,586.1	1,600,580	920,818	9,150,243
1937	5,690.4	1,925,246	967,567	11,095,386
1938	5,666.9	1,540,428	1,033,970	9,037,919
1939	5,666.9	1,318,860	1,036,126	10,015,774
1940	6,096.6	1,641,698	1,306,518	15,259,891
1941	8,221.2	2,684,486	2,260,975	24,598,581
1942 Jan./Nov.	8,551.2	3,636,711	3,088,003	38,664,911

254

255

Item 16 (R. 4811)

REVISED—AUGUST 18, 1943

Estimates of Future Air Traffic (Passenger, Mail and Express) Between United States and South America, Particularly Panagra Countries.

It is estimated that the passenger air traffic between the United States and countries of South America served by Panagra will, for the duration of the war, remain at least at its present level of about 400 passengers a month in each direction.

256 *Exhibit PG-4.*

With additional equipment available and certain government restrictions removed, the flow of traffic should increase considerably.

In view of the hemisphere solidarity and the steady growth in Inter-American commerce, as well as the natural desire of American business to open up new export markets in South America after the war, the post war era will seek a large increase in commercial air travel between the Americas.

After the war, with the resumption of tourist traffic,
257 there will, of course, be a steady growth in passenger traffic.

It is estimated that the current express traffic between the United States and the South American countries served by Panagra, which now averages about 22,000 kilos a month southbound, and 10,000 kilos a month northbound, will steadily increase during the present war and will up to certain point only be limited by the available capacity of present services.

With the resumption of surface transportation after the war, many articles which are now being transported by air may not continue to be shipped in this manner. It is, how-
258 ever, estimated that an express flow of about 15,000 kilos southbound, and 8,000 kilos northbound will remain, and that increased services and capacities, coupled with an increase in normal commerce, will result in a steady increase in air express traffic in both directions between the United States and the countries in South America served by Panagra, as has been the case for many years, even prior to the present emergency.

It is estimated that the present airmail traffic between the United States and the South American countries served by Panagra of approximately 75,000 pounds a year southbound and approximately 40,000 pounds a year northbound wil be maintained for the duration of the war.

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Exhibit PG-4. 259

After that there will be a steady increase in airmail traffic due to the resumption of normal commercial relations and the speeding up of airmail delivery when censorship delays are eliminated.

Items 17 and 18 (R. 4815)

Suggested Schedules Showing Connections at Balboa With Panagra.

PART II—OPERATION WITH DC4 OR EQUIVALENT EQUIPMENT. 260

(Showing Terminal at either Miami or Tampa, and operation of DC4 over entire route between Miami and Lima.)

Daily		75° Meridian Time (EST)	Daily	
12:40		Lv. Tampa Ar.		21:50
	1:30 (2:30 EWT)	Lv. Miami Ar.	21:00	
7:15	7:15	Ar. Balboa Lv.	15:15	15:15
	8:00	Lv. Balboa Ar.	14:35	
	10:10	Ar. Cali Lv.	12:25	
	10:30	Lv. Cali Ar.	12:05	
	12:45	Ar. Guayaquil Lv.	9:50	
	13:05	Lv. Guayaquil Ar.	9:30	
	17:05	Ar. Lima Lv.	5:30	

261

The foregoing southbound schedule assumes that by the time DC4 or equivalent aircraft are made available, general conditions would be such that southbound arrivals at the Canal Zone at dawn or shortly thereafter would be permitted. The northbound schedule could be performed without this assumption providing approximately 24 hour service between New York and Lima. It may also be assumed that when such equipment is available to commercial operators, modified and more rapid schedules in the United States providing close connection at Miami or Tampa with principal cities of the United States could be arranged; and that in peace times, through more flexible customs, immigration, and postal arrangements and equitable agree-

ments with domestic lines, operation of these long range aircraft through to New York or other important interior points in the United States, and handling of customs, immigration and postal procedures at such interior points, could be arranged in order that the speed and ease of travel might keep pace with progress in the development of commercial aircraft.

Even if the Panagra schedules south of Lima remained the same as at present, a 68 hour (elapsed time) service could be maintained between New York and Buenos Aires,
263 as compared with the present 88 hour service by this route. With suitable development of airports and airway aids to permit night flying on the Panagra route, or on portions of it, the schedules south of Lima could readily be modified to reduce this to an elapsed time of less than 48 hours.

Item 20 (R. 4823)

REVISED—JUNE 29, 1943

Estimated Traffic.

DC-4 THROUGH OPERATION BETWEEN MIAMI AND BALBOA

264 (a) Source and character.

Panagra's passenger traffic largely originates in and is destined to the eastern and middle western states. The same thing can be said for express traffic, as well as for the mail carried to and from the countries served by Panagra.

(b) Amount of one-way and round-trip passengers.

It is estimated that Panagra will carry 7200 passengers each year southbound and 5800 passengers each year northbound.

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(c) Mail and express traffic.

It is estimated that Panagra will carry approximately 250,000 pounds of United States mail southbound and approximately 40,000 pounds of mail northbound.

It is expected that Panagra will carry 205,000 pounds of express southbound and 120,000 pounds northbound.

(d) Revenue loads available on suggested route and estimated percentages of use.

DC-4's used on a non-stop run between Miami and Balboa offer an available revenue load of 8112 pounds per trip. It is estimated that 60% of this available payload will be used for revenue purposes. 266

DC-4 Through Operation Tampa to Balboa

(a) Source and character.

Panagra's traffic largely originates in and is destined to the eastern and middle western states.

Inasmuch as the available payload from Tampa to Balboa is approximately 10% less than the payload from Miami to Balboa, the estimated amount of traffic which can be carried on this route with similar equipment is approximately 10% less than that which could be carried from Miami. 267

268 *Exhibit PG-4.*

Item 30, Pages 12-13 (R. 4887-8)

REVISED—AUGUST 27, 1943.

DC-4 Through Operation
Basic Statistics.

(Annual Basis)

	Mileage		Daily
	Route	Round Trip	Round Trip
ROUTES:			
269 Miami/Balboa	.....	.....	.....
Tampa/Balboa	.....	.....	.....
MILEAGE:			
Miami/Balboa	1,150	2,300	839,500
Non Productive—2½%	.....	.....	20,988
			860,488
Tampa/Balboa	1,305	2,610	952,650
Non Productive—2½%	.....	.....	23,816
			976,466
FLYING HOURS:			
Miami/Balboa at 200 MPH	5.75	11.50	4,197
Non Productive—2½%	.....	.....	105
270			4,302
Tampa/Balboa at 200 MPH	6.53	13.05	4,763
Non Productive—2½%	.....	.....	119
			4,882
FLIGHT EQUIPMENT:			
DC-4 Aircraft at $365,000 (hull only)		(1)	$365,000
Engines plus spares (R2000 at $17,500)		(6)	105,000
Propellers plus spares at $4,000		(6)	24,000
Aircraft radio plus spare at $9,000		(2)	18,000
Spare motor mounts at $5,000		(2)	10,000
Spare parts (Miami or Tampa)			120,000
			$642,000

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Exhibit PG-4. 271

		Daily Round Trip	
GROUND EQUIPMENT:			
Station Communication Equipment:			
Miami or Tampa	$35,000		
Camaguey	20,000		
Kingston	20,000		
Puerto Cabezas	20,000		
Barranquilla	17,500	$112,500	
Meteorological Equipment:			
Miami or Tampa	$ 1,000		
Kingston	1,000	2,000	272
Radio Buildings:			
Miami or Tampa	$ 2,000		
Camaguey	2,000		
Kingston	2,000		
Puerto Cabezas	2,000		
Barranquilla	2,000	10,000	
Hangar and Shop Equipment:			
Miami or Tampa	.....	50,000	
Automotive Equipment:			
Miami or Tampa—2 trucks and 3 station wagons		10,000	273
Furniture and Fixtures:			
Miami or Tampa	$ 6,500		
Camaguey	500		
Kingston	500		
Puerto Cabezas	500		
Barranquilla	500	8,500	
		$193,000	
TOTAL INVESTMENT FOR EQUIPMENT		$835,000	

274 *Exhibit PG-4.*

Item 34 (R. 4909-10)

REVISED—JUNE 25, 1943

DC-4 Through Operation
Estimated Annual Revenue and Expenses.

	Tampa/Balboa		Miami/Balboa	
	Amount	Cents Per Revenue Mile	Amount	Cents Per Revenue Mile
REVENUE:				
Passengers	$1,263,200	132.6¢	$1,450,700	172.8¢
Excess Baggage	50,500	5.3	58,000	6.9
Air Express	192,300	20.2	221,100	26.3
Foreign Mail	199,700	20.9	199,700	23.8
275 Total Estimated Revenue	$1,705,700	179.0¢	$1,929,500	229.8¢
EXPENSES:				
Direct Aircraft	$ 655,600	68.8¢	$ 608,200	72.4¢
Depreciation — Flying Equipment	136,500	14.3	136,500	16.3
Ground Expenses—Salaries	361,000	37.9	361,000	43.0
Ground Expenses—Sundries	353,000	37.1	373,900	44.5
Ground Expenses — Depreciation	53,800	5.6	53,800	6.4
	$1,559,900	163.7¢	$1,533,400	182.6¢
Plus 10% for Contingencies	156,000	16.4	153,300	18.3
Total Estimated Expenses	$1,715,900	180.1¢	$1,686,700	200.9¢
Estimated Revenue Over Expenses (before Federal Taxes)	$ *10,200*	*1.1¢*	$ 242,800	28.9¢

276 NOTES: Passenger revenue estimates are based upon the reduced rate between Miami and Balboa which became effective March 3, 1943, which rate is approximately nineteen percent (19%) lower than the previous one. Had the passenger revenue estimate been prepared on the basis of the old rate, the revenue calculations and the estimated revenue over expenses would have been correspondingly higher.

No provision has been included for return on investment or federal taxes theron.

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DC-4 figures have been used for the reason that operating data for this plane is readily available. It is recognized, however, that this type of aircraft may well be obsolete in the light of latest aviation developments. In that event whatever modern and suitable type of four-

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motored flying equipment might be available for this operation should be used. It is believed that the corresponding operating figures would be no less favorable than those submitted herein.

DC-4 Through Operation
Estimated Revenue.

(Annual Basis)

	Daily Round Trip Tampa/Balboa	Daily Round Trip Miami/Balboa
PAYLOAD CALCULATIONS:		
Available payload	7,140 lbs.	8,112 lbs. 278
Mail load reserve (⅓ of Panair's daily mail allotment)	670	670
Available for passengers, express and additional mail	6,470 lbs	7,442 lbs.
Available for express and additional mail (10%)	647	744
Available for passengers	5,823 lbs.	6,698 lbs.
Available seats at 220 lbs. for each passenger and baggage	26	30
PASSENGER REVENUE:		
Available seat miles	24,768,900	25,185,000
Estimated revenue passenger miles (60%)	14,861,340	15,111,000
Passenger tariff ($130) less 15% for discounts and through fares:		
Tampa/Balboa (8.5¢ per passenger mile)	$1,263,214	
Miami/Balboa (9.6¢ per passenger mile)		$1,450,656 279
EXCESS BAGGAGE REVENUE:		
Estimated at 4% of Passenger Revenue	$50,529	$58,026
EXPRESS REVENUE:		
Available for express per trip	647 lbs.	744 lbs.
Available for express per year	472,310 lbs.	543,120 lbs.
Available express pound miles	616,364,550	624,588,000
Estimated express pound miles used (60%)	369,818,730	374,752,800
Express tariff (76¢ per lb.) less 10% for through rates:		
Tampa/Balboa (.052¢ per pound mile)	$192,306	
Miami/Balboa (.059¢ per pound mile)		$221,104
FOREIGN MAIL REVENUE:		
Northbound U. S. Mail from Panagra countries south of Panama-proportion Canal Zone/Miami paid to Panagra (based on July/December, 1942 experience)	$190,000	$190,000
Northbound Panama Mail to United States (based on ⅓ of Panair rate case estimated revenue)	9,700	9,700
	$199,700	$199,700

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Exhibit PG-2.

Minutes of Adjourned Regular Meeting of the Board of Directors of Pan American-Grace Airways, Inc. held at the office of Pan American Airways, Inc., 135 East 42nd Street, New York, N. Y. on the 21st day of September, 1942, at 4:00 o'clock in the afternoon.

Present:

281 Messrs. W. F. Cogswell
A. Garni
H. Preston Morris
R. H. Patchin
G. L. Rihl
Harold J. Roig
J. T. Trippe
E. E. Young

being all of the members of the Board.

Mr. Roig, President, presided. Mr. Cogswell, Secretary, acted as such.

The minutes of the adjourned regular meeting of the
282 Board of Directors held on August 25, 1942 were read and approved.

The President summarized the Orders of the C. A. B. in Dockets Nos. 778 and 779. He pointed out that in Docket 779 we are made a party to the proceeding and recommended that we retain Mr. Gesell as counsel and that the management take such steps as they may deem advisable in the proceeding to the end of obtaining a permanent certificate.

In Docket 778 he recommended that we become a party to the proceeding and apply for a temporary certificate on the basis of three trips per week subject to our commitment to the Air Transport Command.

A general discussion on both proceedings followed, Messrs. Garni, Patchin and Cogswell favoring the recom-

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mendations of the President and Messrs. Trippe, Rihl, Young and Morris being opposed thereto.

After general discussion, the meeting adjourned to 9:30 A. M., September 22, 1942, at the same place.

(sgd.) HAROLD J. ROIG
Chairman

(sgd.) W. F. COGSWELL
Secretary

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Minutes of Adjourned Regular Meeting of the Board of Directors of Pan American-Grace Airways, Inc. held at the office of Pan American Airways, Inc., 135 East 42nd Street, New York, N. Y. on the 22nd day of September, 1942 at 2:30 o'clock in the afternoon.

Present:

Messrs. W. F. COGSWELL
A. GARNI
H. PRESTON MORRIS
R. H. PATCHIN
G. L. RIHL
HAROLD J. ROIG
J. T. TRIPPE
E. E. YOUNG

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being all of the members of the Board.

Mr. Roig, President, presided. Mr. Cogswell, Secretary, acted as such.

Mr. Garni moved the following resolution which was seconded by Mr. Patchin:

RESOLVED that the President of the Company is hereby authorized to retain Counsel to represent the Company in connection with CAB Order Docket No. 779 dated September 10, 1942 and to take all

286 all necessary action to present to the CAB the Company's position with respect to said order to the end that the CAB authorize and require the amendment to the Company's Certificate of Convenience and Necessity in the manner referred to in said Order, U. S. terminals to be Miami and such other terminal as may be agreed upon between Mr. Roig and Mr. Rihl or, failing such agreement, by the CAB.

Vote being had said resolution failed to pass, Messrs.
287 Roig, Garni, Patchin and Cogswell voting in favor and Messrs. Trippe, Young, Rihl and Morris voting against.

Mr. Young stated that the proposal of the Grace interests that Pan American-Grace should apply for a certificate of convenience and necessity between the Canal Zone and the continental United States had been discussed so often and at such length by the parties that no useful purpose would be served by further extended discussion. However, he desired briefly to state for the record:

1. Pan American-Grace now operates on the west coast of South America and across the Andes. Its only American flag competitor is the Grace Steamship Line, competition
288 for air traffic between the United States and Buenos Aires being nominal. It enjoys end-on connecting services at the Canal Zone furnished by the three trunk lines of Pan American Airways across the Caribbean and through Central America. The best interests of the Company require that its energies should be devoted to the intensive development of this important route, utilizing fully the technical, sales and traffic organizations of Pan American Airways, and that its energies should not be dissipated by attempted extensions into territories already served by Pan American.

2. An extension of the route of Pan American-Grace Airways from the Canal Zone to the United States would

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bring it into direct competition with the routes which Pan American Airways, 50% owner of Pan American-Grace, has operated for more than 13 years and for which it holds a certificate of convenience and necessity, as well as with the northern portion of the route of the Grace Steamship Line. Such a situation would be directly contrary to the public interest, as recently enunciated by the Civil Aeronautics Board, which said that there would be "inherent in such an arrangement, the possibility, where the interests of air and steamship transportation come into conflict, that an impasse would be reached concerning 290
the policies of the joint company which might obstruct or retard its activities and the development of air transportation".

3. Pan American-Grace Airways, in view of its obligations to the War Department and on its own route, has neither the equipment, the personnel nor the facilities required for even a limited twin-engined service between the Canal Zone and the United States. The proposal is therefore wholly academic.

4. The proposal is contrary to the basic agreement 291
between Pan American Airways Corporation and W. R. Grace & Co. under which the two companies associated themselves to form Pan American-Grace. This agreement provided that the Company was to operate "on the route from the Panama Canal to Valparaiso," that Grace was to have an option to acquire an interest therein not to exceed more than 50% of the total capitalization, and that Pan American was to have charge of the operation. A departure from this basic agreement of the two stockholders has not and cannot be made without their agreement, and is outside the appropriate scope of action by the directors.

Mr. Trippe, Mr. Rihl and Mr. Morris concurred in these views.

292 *Exhibit PG-2.*

Mr. Garni then made the following statement in which Messrs. Roig, Patchin and Cogswell concurred:

"I quite agree with Mr. Young's statement that no useful purpose will be served by extended discussion at this time. I will not attempt therefore to state our position fully.

"It does seem to me, however, that the position taken by Messrs. Young, Trippe, Rihl and Morris overlooks the fact that the matter is before this meeting in quite a different light than at any previous time. The CAB has by its Order in Docket 779, made this company a party to a
293 proceeding instituted by the CAB and in our opinion it is plainly the company's duty to appear in this proceeding and present its case from its standpoint as an independent entity. The object of my resolution is to enable the company to do this. The effect of the vote of Messrs. Trippe, Young, Rihl and Morris is to make this impossible. The CAB by its Order in Docket 778 has instituted an investigation of the entire situation in the Caribbean area on the ground that there exists in that area "a serious shortage of transportation facilities due to the war, which may adversely affect the national defense and the relations of the United States with Latin American countries". The Order
294 invites anyone able to do so to apply for temporary certificate to operate in this area to assist in relieving this war emergency. It seems to me that it is the duty of this company to respond to this invitation to the limit of its ability with due regard to its other obligations.

"Commenting seriatim and very briefly on the four points raised by the Pan American Directors, I would merely like to say:

1. The relevancy to the present resolution of the reference to the Grace Line in this and in the next paragraph is not apparent. Competition for air traffic between the United States and Buenos Aires is not nominal and will become increasingly important. Panagra is devoting and will devote its

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energies to the intensive development of its main route as it has in the past. In doing this experience shows that it can count on very little constructive assistance from Pan American Airways. We believe that extension of the company's route to a terminal or terminals in the United States is in no way inconsistent with the development of its present route but is essential to such development; that such extension is in the best interests of the company and in the public interest and that the company should present its position in this regard to the CAB in 296
response to its Orders in Dockets 778, 779 and should offer any services within its power to the CAB to meet the war emergency.

2. There is nothing in the instant situation comparable to that before the CAB in the decision to which Mr. Young refers. The CAB with all the facts before it can determine the principles applicable to the present problem.

3. The statements in this paragraph are incorrect. Mr. Rihl, after a complete study, has stated to this meeting that it is entirely possible for Panagra 297
to undertake, commencing now, three trips per week with a DC-3 airplane between Balboa and Miami. This service, if begun now under the Order in Docket 778 may or may not have to be interrupted later owing to the company's obligations to the Air Transport Command depending on the time when the Air Transport Command is able to make equipment available to the company for this service. It is entirely possible that we may be able to run both services. Our feeling is that in view of the war emergency referred to in No. 778 the company should submit all the facts to the CAB and indicate its willingness to be of such help as it can with due regard to its other obligations and that it should not totally decline

any offer of assistance. As far as No. 779 is concerned that does not in any case contemplate immediate operation and there is no reason whatever to suppose that any Order of the Board issued in this proceeding will not afford ample opportunity to the Company to provide any equipment, personnel and facilities which may be necessary.

4. The proposal is not contrary to any agreement between W. R. Grace & Co. and Pan American Airways Corporation and the matter is not one to
299 be determined by the stockholders of Panagra rather than by its directors. By agreement between W. R. Grace & Co. and Pan American Airways dated February 14, 1939 it is provided that if the Pan American connecting service between Miami and the Canal Zone is at any time inadequate Panagra shall be permitted to apply to the CAB for a certificate to operate this connecting service. Under this agreement the Pan American directors are clearly obligated to vote in favor of the resolution."

Messrs. Trippe, Young, Rihl and Morris dissented from
300 the views expressed by Mr. Garni for the reasons set forth in the above statement made by Mr. Young. Mr. Rihl thereupon moved the following resolution which was seconded by Mr. Young:

WHEREAS, the Civil Aeronautics Board has instituted a proceeding known as Docket No. 779 "to determine whether the public convenience and necessity require that the certificate of public convenience and necessity of Panagra should be altered, amended, and modified to authorize and require (a) that Panagra's route terminate in the United States at Miami or Tampa, Florida; New Orleans, Louisiana; Brownsville or El Paso, Texas; Los Angeles, California; or at two or more of said points; and (b) in the event a

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terminal or terminals in the United States are authorized and required pursuant to this proceeding, that Panagra serve one or more intermediate points between the Canal Zone and said terminal or terminals in the United States;" and

WHEREAS, the Board has made Panagra as well as Pan American Airways, Inc. and W. R. Grace & Co. parties to the said proceeding; and

WHEREAS, half of the capital stock of Panagra is owned by Pan American Airways Corporation and half by W. R. Grace & Co., and four of the directors of Panagra are officers of Pan American and the other four are officers of Grace; and 302

WHEREAS, an amendment of the certificate of public convenience and necessity of Panagra so that Panagra's route should terminate in the United States is favored by Grace and by the four directors of Panagra who are officers of Grace, and is opposed by Pan American and the four directors of Panagra who are officers of Pan American; and

WHEREAS, while in view of the foregoing Panagra as a corporation is not authorized to take any position in the said proceeding, it nevertheless requires the services of counsel, in order that all relevant facts desired by the Civil Aeronautics Board or by the parties to the proceeding may be elicited. 303

NOW, THEREFORE, BE IT

RESOLVED, that

(1) the retainer by Panagra of Gerhard A. Gesell, Esq. of Washington, D. C. (or if he shall be unavailable, such other attorney as may be approved by Harold J. Roig, President, and by either George L. Rihl, Vice President, of Panagra, or E. E. Young, Director of Panagra) to represent Panagra in C.A.B.

304 *Exhibit PG-2.*

Docket No. 779 be and the same hereby is authorized and approved;

(2) the two said officers of Panagra shall jointly request counsel to act and shall inform counsel that the proposed retainer is pursuant to this resolution of the Board of Directors;

(3) counsel shall be instructed that he is not to take any position in respect of the merits of the said proceeding, but that he shall see to it that all relevant information in the possession of Panagra which
305 may be desired by the Civil Aeronautics Board or by the parties to the said proceeding, is made available to the Board and such parties, respectively, under such reasonable limitations as counsel may deem necessary in the interests of Panagra; and that counsel shall report to the said Harold J. Roig and the said George L. Rihl (or in the absence of said George L. Rihl, the said E. E. Young) jointly, shall act only on their joint instructions, and in the event of any difference of opinion between them shall report for instruction to the Board of Directors.

306 Vote being had on the above resolution same was passed. Messrs. Roig, Garni, Patchin and Cogswell in voting in favor of the resolution stated that Mr. Garni's resolution represented their views in the matter but they were voting in favor of Mr. Rihl's resolution in a spirit of compromise and to avoid a deadlock but without any implication from the preambles to said resolution that Panagra is not an independent entity or any implication except for the purpose of this resolution that Panagra should take merely a neutral position in the proceeding.

On motion of Mr. Garni, and seconded by Mr. Patchin, the following resolution was moved:

RESOLVED, that the proper officers of this corporation are hereby authorized to file application pursu-

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ant to Order of the CAB in Docket 778 dated September 10, 1942 for a temporary Certificate of Convenience and Necessity for operation between Miami and Balboa subject to our commitments to the Air Transport Command, under advice to the Air Transport Command, and to retain Counsel and take all steps necessary in the premises; said application to the CAB to contain full statement of our equipment and personnel position with respect to our ATC commitment and to our other services.

308

Vote being had, said resolution failed to pass, Messrs. Roig, Garni, Patchin and Cogswell voting in favor and Messrs. Trippe, Young, Rihl and Morris voting against.

* * * * * *

Mr. Roig made the following statement in which Messrs. Garni, Patchin and Cogswell concurred:

"* * * Mr. Rihl has conceded that we are in a position to begin at once a three times a week service between Miami and Balboa. All I wish to do is to offer that service subject to its termination if and when our other commitments require and to be authorized, subject to this limitation, to endeavor to work out both matters in the best way possible in 309 the light of circumstances as they develop. The questions of public policy involved may well be left to the C.A.B. to whom I would submit a full statement of the facts.

The reasons for the refusal of Messrs. Trippe, Rihl, Young and Morris to authorize this are obviously not those contained in the above statement nor in the preambles of Mr. Rihl's resolution. Pan American is for reasons which are well known and which Mr. Young has briefly outlined unalterably opposed to Panagra's coming to a United States terminal. That is the reason for their resolution preventing Panagra from taking, even temporarily, action to that end. Pan American Airways has always opposed

310 *Exhibit PG-2.*

and will oppose before the C.A.B. Panagra's coming to a United States terminal and its directors are using their positions on this Board to render the Company powerless to defend itself.

Like everyone else in these times, Panagra has many difficult things to do all of which must somehow be done simultaneously. It is the duty of management in time of war to do difficult things and not to seek plausible excuses for avoiding them. Of course, we must maintain and improve our regular service. Of course we must carry out
311 our commitments with the Air Transport Command. But in our opinion we must also do something in response to the C.A.B. Order in Docket 778. Under the Order the C.A.B. for reasons based on the war emergency is seeking temporary services in the Caribbean area. For Panagra to assume a purely negative attitude and make no constructive response to this in view of the vital concern which we have in the matter is, in our opinion, contrary to both the public interest and the best interests of our Company. Whatever the difficulties may be, we believe that the officers should be authorized to endeavor to meet them and that the directors should devote their efforts to seeking ways and means to assist to that end."

312 On motion duly adopted, the meeting was adjourned to 9:30 A.M., September 23, 1942, at the same place.

(sgd) HAROLD J ROIG
Chairman

(sgd) W F COGSWELL
Secretary

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Exhibit PG-2.

313

Minutes of Adjourned Regular Meeting of the Board of Directors of Pan American-Grace Airways, Inc. held at the office of Pan American Airways, Inc., 135 East 42nd Street, New York, N. Y. on the 11th day of November, 1942 at 9:30 o'clock in the forenoon.

Present:

Messrs. W. F. Cogswell
A. Garni
H. P. Morris
R. H. Patchin
G. L. Rihl
H. J. Roig
J. T. Trippe
E. E. Young

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being all of the Board.

Mr. H. J. Roig, President of the corporation, presided.

Mr. W. F. Cogswell, Secretary, acted as Secretary of the meeting.

* * * * * *

315

The President reported on the developments in Dockets 778 and 779 since the last meeting, including the efforts to obtain counsel to represent Panagra pursuant to the limited resolution of the Board. He recommended the employment of counsel to represent Panagra with full power to act for the reasons set forth in substance in letter attached marked Exhibit "A".

Mr. Garni thereupon moved, seconded by Mr. Cogswell, that counsel be retained in Docket 779 in accordance with this recommendation. Vote being had, said resolution failed to pass, Messrs. Roig, Garni, Patchin and Cogswell voting in favor and Messrs. Trippe, Young, Rihl and Morris voting against.

316 *Exhibit PG-2.*

Thereupon, Mr. Trippe moved, seconded by Mr. Rihl, that the officers of Pan American-Grace Airways, Inc. be instructed to retain counsel in accordance with the terms of the resolution which was unanimously adopted at the meeting of September 22, 1942. Vote being had, said resolution failed to pass, memorandum in respect to vote of Messrs. Trippe, Young, Rihl and Morris being hereto annexed marked as Exhibit "B".

There being no further business, the meeting thereupon adjourned.

317 (sgd.) H. J. Roig
Chairman

(sgd.) W. F. Cogswell
Secretary

Exhibit "A" to Minutes of November 11, 1942

W. R. Grace & Co.
7 Hanover Square, New York
November 18, 1942

318 Messrs. H. Preston Morris, Geo. L. Rihl, Juan T. Trippe and Evan E. Young, Directors representing Pan American Airways Corporation on the Board of Pan American-Grace Airways, Inc.

c/o Pan American Airways Corporation
15 Exchange Place
Jersey City, N. J.

Dear Sirs:

Your Memorandum dated November 11th addressed to Messrs. Cogswell, Garni, Patchin and Roig was received on November 13th.

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Exhibit PG-2. 319

This answer is written on behalf of myself and the others above mentioned.

At the meeting on November 11th I stated that I felt that Panagra should have counsel in Docket 779 with broader powers than those authorized by the resolution of the meeting of September 22, 1942 and urged that I be authorized to retain counsel with full powers. In support of my request, I called attention to the following:

1. When the September resolution was adopted it was thought that the parties in Docket 779 would only be those made parties by the Board's Order, 320 namely, Grace, Pan American and Panagra. Since then a considerable number of other air lines have sought to consolidate route applications of theirs in Docket 779 and while the Board has refused consolidation it has permitted intervention of a number of these lines which means that the proceeding will involve not only the matters originally contemplated but the opposition of others besides Pan American to the extension of Panagra's route.

2. Since the adoption of the September resolution, at a meeting with the C. A. B. held on October 28, 1942, Mr. Henry Friendly, counsel for Pan 321 American stated, in Mr. Trippe's presence, that I was always "trotting out" the question of Panagra's having separate counsel; that this was merely a "red herring" and that Panagra did not need counsel in this matter. This seemed to me to indicate that Pan American was not seriously seeking to obtain counsel even under the restricted September resolution.

3. Mr. Gesell, named in the September resolution, was, after the events referred to in Paragraph "1", unable to act owing to his firm's being counsel for the Air Transport Association. He felt there was little of constructive nature which an attorney em-

ployed under the resolution could accomplish in the absence of an agreement between the stockholders that Panagra should take a positive position in the proceeding, and was willing to act as counsel solely because he felt his prior representation of Panagra and his previous relations with the parties placed him under obligation to be of whatever assistance he could in what was clearly a very unusual and difficult situation. Except for these considerations neither he nor his firm would have considered accepting a retainer under the restricted September
323 resolution. Mr. Gesell and not I suggested the firm of Milbank, Tweed & Hope. The retainer was offered to that firm by Messrs. Friendly, Rihl, Roig and Cogswell. They declined to act on the specific ground that under the limitations of the resolution they would not have a real client and could not properly exercise the functions of counsel in the proceeding. In discussing their refusal with Mr. Friendly, he stated to me that he had been thinking of how his firm would react to a similar proposal in these days when good law offices are shorthanded and overworked and that he felt that his firm would probably
324 have taken the same view of it and would not be interested in a retainer of this troublesome character in these days. I stated that these experiences had led me to doubt if any firm of the sort we would want would accept retainer under the restrictions of the September resolution. I never made the other statements regarding my conversation with Mr. Friendly attributed to me in your memorandum.

4. Prior to our seeing the firm of Milbank, Tweed & Hope, Mr. Rihl had suggested and I had agreed that pending the selection of counsel under the resolution, Messrs. Cogswell and Morris should act for Panagra and they appeared for Panagra at the Pre-

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Hearing Conference held on October 30th pursuant to this arrangement. The result, however, of being represented by two counsel who could not agree among themselves had not been satisfactory.

5. Finally, and most important, since the adoption of the September resolution, Pan American has filed a so-called Answer and Petition in Docket 779 in which they launch an attack against Panagra as well as Grace. The attack questions the very standing of Panagra as an air carrier and the Petition requests an investigation by the Board under Section 415 of the Act,—that section by its Terms being the one under which the Board is "empowered to inquire into the management of the business of any air carrier." I stated that, while Grace could defend itself against the attack on it, I felt that, under these circumstances, Panagra should certainly have counsel of its own to defend itself against this attack and to protect its position without any limiting restrictions. With Pan American formally petitioning the C. A. B. to investigate the "management of the business" of Panagra, it seems unthinkable that Panagra should not be permitted to have counsel with the full power and authority necessary adequately to protect its position. I stated further, in effect, that the Pan American directors of Panagra were certainly not at liberty acting as Pan American to attack Panagra's good name and demand an investigation of its management under Section 415 of the Act and then, as Directors of Panagra, to prevent Panagra from obtaining counsel to defend itself against this very attack.

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I stated that in view of all of the foregoing, the September resolution was no longer adequate, even as a compromise solution, to meet the situation as it now existed and

328 *Exhibit PG-2.*

that Panagra should accordingly retain counsel to represent it fully and without restriction. Mr. Garni thereupon offered a motion to this effect which the Grace directors voted in favor of and you voted against.

My views remain as stated above and they are shared by Messrs. Garni, Patchin and Cogswell. We do not feel that any useful purpose would be served by proceeding further under the September resolution. Counsel, even if secured thereunder, would clearly be unable in the present state of the proceedings to act effectively under the restrictions
329 imposed by that Resolution. We feel very strongly that in insisting on proceeding further under the September resolution and refusing, in the light of the existing situation, to permit Panagra to retain counsel to appear generally for it in this proceeding with full and unrestricted authority to represent the Company's interests, you are taking action which is directly prejudicial to Panagra and for which you must assume full individual responsibility.

Very truly yours,

(sgd) HAROLD J. ROIG

330 HAROLD J. ROIG

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Exhibit PG-2.

Exhibit "B" to Minutes of November 11, 1942

PAN AMERICAN AIRWAYS CORPORATION
15 Exchange Place, Jersey City, N. J.

November 11, 1942.

Memorandum to Messrs. Cogswell, Garni, Patchin and Roig—Directors representing W. R. Grace & Co. on the Board of Pan American-Grace Airways, Inc.

332

Dear Sirs:

Just before the conclusion of the Pan American-Grace Airways, Inc. Board meeting this morning, Mr. Garni proposed and Mr. Cogswell seconded a new resolution with respect to the retainer of counsel to represent Pan American-Grace Airways, Inc. in the proceeding now pending before the Civil Aeronautics Board known as Docket 779, to supersede the resolution which was passed by an unanimous vote of all of the directors at the meeting of the Board held on September 22, 1942, a copy of which is attached.* You voted in favor of this new resolution and the undersigned voted against it.

333

Mr. Trippe then moved that the officers of Pan American-Grace be instructed to retain counsel in accordance with the terms of the resolution which was unanimously adopted at the meeting of September 22, 1942. This resolution was seconded by Mr. Rihl. The undersigned voted in favor of this resolution and you voted against it.

Mr. Roig has also stated to various of our officers that he did not intend to take any further action to retain counsel to represent Pan American-Grace Airways, Inc. as directed by the resolution unanimously adopted by the Board of Directors on September 22, 1942.

* Resolution printed *supra*, pp. 100-103.

334 *Exhibit PG-2.*

Particularly in view of certain statements made by Mr. Roig at yesterday's meeting we desire to have the record of the meeting contain this statement of our position in the matter.

The resolution adopted at the meeting of September 22, 1942 called for the retainer of Mr. Gerhard A. Gesell of the firm of Covington, Burling, Rublee, Acheson & Shorb, of Washington, D. C., or such other counsel as might be jointly approved by Mr. Roig and either Mr. Rihl or Mr. Young. Mr. Gesell was entirely willing to act so far as the
335 terms of the resolution were concerned, but felt obliged to decline the retainer because of the appearance in this case of various domestic air lines which were members of the Air Transport Association for which his firm was counsel.

Mr. Roig then suggested the firm of Milbank, Tweed & Hope of New York City, which was approved by Mr. Rihl. This firm felt unable to act. Shortly afterwards Mr. Rihl was obliged to go to South America on important business. Mr. Graham Grosvenor, a director and member of the Executive Committee of Pan American, informed Mr. Roig that he was acting for Mr. Rihl in the latter's absence and
336 requested Mr. Roig to consider the retainer as counsel of another firm which would be approved by Mr. Young. Mr. Roig declined to take any further action pursuant to the unanimous resolution of the Board of Directors of Pan American-Grace, and for that reason at Mr. Roig's suggestion Mr. Cogswell and Mr. Morris appeared at the prehearing conference held on October 30th to act jointly as counsel for Pan American-Grace under the terms of the resolution until such time as outside counsel might be retained.

In our opinion Mr. Roig's position is plainly contrary to the resolution and to his duty as an officer of Pan American-Grace Airways to carry on under a resolution unanimously adopted by its Board of Directors.

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Exhibit PG-2.

The only reasons which Mr. Roig has expressed to us for his refusal to do this are: (1) a claim that he was informed by Mr. Friendly of Root, Clark, Buckner & Ballantine, our counsel, that his firm would not undertake to represent Pan American-Grace under reservations such as those contained in the resolution, and that most of the good firms in New York were so busy that they would not wish to represent Pan American-Grace under existing conditions, and (2) a statement that the answer filed by Pan American Airways under date of October 26, 1942 attacked Pan American-Grace Airways.

We have checked with Mr. Friendly as to his conversations with Mr. Roig. Mr. Friendly states categorically that on no occasion did he say that there was any reason why his firm, if it were otherwise free to act, or any other firm, should feel it improper to accept a retainer under the terms of the resolution in question. The fact that Messrs. Covington, Burling, Rublee, Acheson & Shorb, a firm of the highest standing, which has represented your Company, was willing to act under the resolution except for other disqualifications not relevant here, should remove any argument that the terms of the resolution would make the retainer of outside counsel impracticable. Mr. Friendly recalls stating that the large firms in New York were very busy and that he thought this might have had something to do with the unwillingness of Messrs. Milbank, Tweed & Hope to act. However, the idea that all reputable law firms in New York or Washington are so busy as to make it impossible to find one that would accept a retainer from Pan American-Grace Airways seems to us, as it does to Mr. Friendly, to be preposterous.

On the second point, our answer was not intended, and cannot be fairly be construed, to reflect upon action taken or omitted to be taken by the *officers* of Pan American-Grace in carrying out policies adopted by the *Board of Directors* but rather upon the position of Grace and its directors in determining policies. Moreover, nothing in

340 *Exhibit PG-2.*

the resolution adopted at the meeting of September 22nd could be construed as preventing counsel selected to represent Pan American-Grace Airways, Inc. from presenting any *facts* as to the history of that Company which counsel considered to be relevant, and it would be assumed, of course, that counsel would do this.

Very truly yours,

(sgd) H. Preston Morris
341 (sgd) Geo. L. Rihl
(sgd) J. T. Trippe
(sgd) Evan E. Young

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Pan American Airways Exhibit No. P-2 (Excerpts)

(R. 6390-9)

Total Volume of Passenger Traffic Out of Miami 1929-1942

Outbound from Miami to:-	1929	1930	1931	1932	1933	1934	1935	1936	1937	1938	1939	1940	1941	1942
C Cristobal (1942—Balboa)	1	15	55	54	104	152	168	175	320	401	464	1,241	2,273	6,053
C Panama		1												
S Buenos Aires							18	57	68	69	76	99	512	405

(Prior to July 1, 1941 (except for two months—1940) passenger traffic statistics reflected in this exhibit were compiled on the basis of flight coupons used to stop-over points or division junctions.

Since July 1, 1941, passenger traffic statistics reflected in this exhibit have been compiled to show origin and destination on Pan American Airways, Inc. regardless of stop-overs.)

Total Volume of Passenger Traffic Into Miami 1929-1942

Inbound to Miami from:-	1929	1930	1931	1932	1933	1934	1935	1936	1937	1938	1939	1940	1941	1942
C Cristobal (1942—Balboa)	3	18	64	81	138	173	218	267	362	517	554	1,368	2,315	7,062
C Panama		6	5											
S Buenos Aires							16	81	81	50	72	70	607	621

(Note on Page 3 of this exhibit applicable to above statistics.)*

Total Volume of Passenger Traffic Out of Brownsville 1929-1942

Southbound from Brownsville to:-	1932	1933	1934	1935	1936	1937	1938	1939	1940	1941	1942
C Panama	3	6	3	3	1	2	10	17	54		
C Balboa										1,206	5,875
S Buenos Aires										20	19

(Note on Page 3 of this exhibit applicable to above statistics.)*

Total Volume of Passenger Traffic into Brownsville 1929-1942

Northbound to Brownsville from:-	1932	1933	1934	1935	1936	1937	1938	1939	1940	1941	1942
C Cristobal	15	20	40	63	27	55	39	108	95	243	
C Panama	2	1	3	9	12	14	16	28	56		
C Balboa										495	4,214
S Buenos Aires										5	7

(Note on Page 3 of this exhibit applicable to above statistics.)*

* See note above.

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346 **Pan American Airways Exhibit No. P-14.**

(R. 6427-30)

Witness: R. G. Ferguson

Pounds of Mail Carried Between U. S. and Canal Zone in Both Directions—January 1, 1938-December 31, 1942.

Month	Miami-Canal Zone	Canal Zone-Miami	Brownsville-Canal Zone	Canal Zone-Brownsville
1938:				
January	3,473	2,684	887	326
347 February	3,037	2,585	881	451
March	3,218	2,754	827	523
April	3,557	2,418	752	437
May	3,578	3,172	646	108
June	3,572	2,967	624	64
July	4,020	3,143	600	80
August	3,837	3,024	726	127
September	3,712	2,946	674	103
October	4,314	3,390	764	164
November	3,976	3,285	757	148
December	4,656	3,618	906	94
Total	44,950	35,986	9,044	2,625
348 *1939:*				
January	4,121	4,481	950	289
February	3,800	3,411	790	69
March	4,636	3,958	815	73
April	5,340	4,076	715	294
May	5,225	4,799	706	200
June	4,939	4,166	722	193
July	5,404	4,469	756	186
August	5,384	4,555	761	149
September	5,490	4,385	820	182
October	5,888	4,836	957	175
November	5,695	5,253	949	166
December	7,272	5,432	1,383	274
Total	63,194	53,821	10,324	2,250

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Pan American Airways Exhibit No. P-14. 349

Month	Miami-Canal Zone	Canal Zone-Miami	Brownsville-Canal Zone	Canal Zone-Brownsville
1940:				
January	6,691	4,908	1,002	337
February	5,848	4,826	908	269
March	6,788	5,310	1,089	270
April	6,552	4,943	1,142	311
May	6,441	5,438	1,266	380
June	6,281	5,374	1,234	374
July	8,343	5,739	1,148	416
August	9,183	5,624	1,137	345
September	6,231	5,009	1,086	1,044
October	8,577	5,646	1,139	859
November	7,796	5,295	1,042	684
December	9,235	6,795	1,581	1,204
Total	87,966	64,907	13,774	6,493
1941:				
January	8,953	8,960	1,152	1,138
February	8,142	8,153	1,028	1,243
March	8,653	8,675	1,048	1,462
April	9,554	9,579	924	1,202
May	12,053	12,073	1,022	1,347
June	10,867	10,880	1,163	1,399
July	12,396	9,217	1,181	2,115
August	12,342	8,997	1,472	1,453
September	11,989	8,862	1,394	1,113
October	12,086	9,202	1,914	1,506
November	12,721	9,848	1,961	1,296
December	16,008	11,812	2,098	1,176
Total	135,764	116,258	16,357	16,450

350

351

352 *Pan American Airways Exhibit No. P-14.*

Month	Miami-Canal Zone	Canal Zone-Miami	Brownsville-Canal Zone	Canal Zone-Brownsville
1942:				
January	16,872	12,725	2,009	1,143
February	19,550	16,616	2,960	1,394
March	23,325	23,389	3,737	897
April	26,272	24,601	3,074	221
May	31,389	26,285	2,892	176
June	33,307	26,255	2,790	63
July	35,942	28,162	1,915	59
August	42,844	29,493	1,433	45
353 September	41,691	31,250	1,563	44
October	47,425	34,491	1,531	53
November	47,245	34,480	1,710	46
December	56,947	47,623	2,442	....
Total	422,809	335,370	28,056	4,141

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Pan American Airways Exhibit No. P-14. 355

Tabulation of Pounds of Express Carried from Miami to the Canal Zone and Beyond and from the Canal Zone to Miami During the Period January 1, 1938 through December 31, 1942.

Month	Pounds of Express Carried — Both Directions	Miami to Canal Zone and Beyond	Canal Zone and Beyond to Miami
1938:			
January	3,113	2,646	467
February	8,526	7,077	1,449
March	10,339	8,478	1,861
April	12,057	10,128	1,929
May	12,259	9,930	2,329
June	11,127	9,458	1,669
July	12,124	9,942	2,182
August	15,929	13,221	2,708
September	11,276	9,246	2,030
October	12,978	10,772	2,206
November	15,344	12,429	2,915
December	15,694	13,183	2,511
Total	140,766	116,510	24,256
1939:			
January	12,047	9,879	2,168
February	15,018	12,465	2,553
March	18,184	14,911	3,273
April	16,562	13,415	3,147
May	16,480	13,843	2,637
June	17,222	14,294	2,928
July	14,854	12,180	2,674
August	14,720	12,071	2,649
September	14,975	12,429	2,546
October	14,847	12,175	2,672
November	16,620	13,462	3,158
December	21,621	17,945	3,676
Total	193,150	159,069	34,081

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357

358 *Pan American Airways Exhibit No. P-14.*

Month	Pounds of Express Carried — Both Directions	Miami to Canal Zone and Beyond	Canal Zone and Beyond to Miami
1940:			
January	14,160	11,753	2,407
February	15,956	13,084	2,872
March	19,830	16,459	3,371
April	18,364	14,875	3,489
May	28,233	23,716	4,517
June	21,864	18,147	3,717
July	18,483	15,341	3,142
359 August	18,562	15,221	3,341
September	19,265	15,605	3,660
October	20,223	16,785	3,438
November	21,893	17,952	3,941
December	22,124	18,584	3,540
Total	238,957	197,522	41,435
1941:			
January	22,642	18,793	3,849
February	23,186	19,013	4,173
March	22,982	18,615	4,367
April	21,062	17,692	3,370
360 May	19,683	16,337	3,346
June	18,238	14,773	3,465
July	17,961	14,116	3,845
August	20,208	17,161	3,047
September	18,774	15,143	3,631
October	21,275	18,228	3,047
November	22,257	18,342	3,915
December	21,146	18,095	3,051
Total	249,414	206,308	43,106

Pan American Airways Exhibit No. P-14. 361

Month	Pounds of Express Carried		
	Both Directions	Miami to Canal Zone and Beyond	Canal Zone and Beyond to Miami
1942:			
January	24,164	21,067	3,097
February	27,866	22,339	5,527
March	46,636	40,860	5,776
April	55,204	51,782	3,422
May	59,679	56,350	3,329
June	37,847	33,603	4,244
July	77,126	65,159	11,967
August	36,853	29,293	7,560
September	100,720	93,515	7,205
October	156,869	146,818	10,051
November	136,026	127,552	8,474
December	106,312	97,353	8,959
Total	865,302	785,691	79,611

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NOTE: Statistics on Express carried Brownsville-Canal Zone-Brownsville not available.

363

364

Pan American Airways Exhibit P-37.

(Ordered to be furnished by Pan American pursuant to request of W. R. Grace & Co.)

• • • •

PAN AMERICAN AIRWAYS CORPORATION
BOARD OF DIRECTORS

January 7, 1941.

A discussion thereupon ensued regarding a proposal to have Pan American-Grace Airways, Inc., or another company in which it would be interested, apply for author-
365 ity to operate between New Orleans and the Canal Zone. It was the sense of the meeting that such proposed action should be opposed (P-37, p. 20, R. 7334).

PAN AMERICAN AIRWAYS CORPORATION
EXECUTIVE COMMITTEE

January 14, 1941.

The meeting proceeded to consideration of a proposal made by Mr. Harold J. Roig, of W. R. Grace & Company, that the Corporation should acquiesce in the filing by Pan American-Grace Airways, Inc. of an application for a cer-
366 tificate of convenience and necessity between the Canal Zone and New Orleans, Louisiana, and of a notice of a meeting of the Board of Directors of Pan American-Grace Airways, Inc. which had been called for the afternoon of January 14, 1941, to consider the same matter. Mr. Henry J. Friendly, of Root, Clark, Buckner & Ballantine, counsel for the Corporation, was invited to enter the meeting at this point. Mr. Friendly presented a legal opinion rendered by his firm and participated in the discussion. After full consideration, it was, upon motion duly made and seconded, unanimously

RESOLVED, that the Corporation, as owner of half of the stock of Pan American-Grace Airways, Inc.,

should decline to acquiesce in the filing by Pan American-Grace Airways, Inc. of an application for a certificate of convenience and necessity between the Canal Zone and New Orleans, Louisiana, and that the representatives of the Corporation upon the Board of Directors of Pan American-Grace Airways, Inc. should not attend the meeting of such Board of Directors called for the afternoon of January 14, 1941, to act upon such proposal, or any adjournment thereof, and, except upon further instructions from the Executive Committee or the Board of Directors, should not attend any other meeting of the Board of Directors of Pan American-Grace Airways, Inc. at which action is to be taken upon the subject matter above described. 368

It was further determined that the proper officers of the Corporation should promptly communicate with Mr. Roig, and discuss the matter with him so that the position of the Corporation might be fully understood. A form of letter to be addressed to Mr. Roig, in the event that, after such conversations, he was nevertheless determined to proceed with the meeting of the Board of Directors of Pan American-Grace Airways, Inc., was approved (P-37, pp. 20-21, R. 7334-5). 369

PAN AMERICAN AIRWAYS CORPORATION
BOARD OF DIRECTORS

July 1, 1941.

Mr. Trippe reported to the meeting on developments to date in connection with a proposal submitted by W. R. Grace & Co. relating to an extension of the operations of Pan American-Grace Airways, Inc. from the Canal Zone to New Orleans, and the filing of an application with the Civil Aeronautics Board for a certificate of convenience and necessity on such route. He referred to the special

370 *Pan American Airways Exhibit No. P-37.*

meeting of the Board of Directors of Pan American-Grace Airways, Inc. which had been called for June 18, 1941 to act upon such proposal, and the subsequent adjournments of such meeting. Mr. Trippe pointed out that in January, 1941 a meeting of the Board of Directors of Pan American-Grace Airways, Inc. had been called to act upon the same proposal, and recalled that the Board of Directors of Pan American Airways Corporation, as also its Executive Committee, had determined that the Company should decline to acquiesce in such proposal, and that the Executive Committee had issued instructions to the representa-
371 tives of Pan American Airways Corporation on the Board of Directors of Pan American-Grace Airways, Inc. not to attend any meetings of the Board of Directors of Pan American-Grace Airways, Inc. at which such proposal was to be acted upon. He also stated that, at the request of Pan American Airways Corporation, a special meeting of the stockholders of Pan American-Grace Airways, Inc. had been called to be held on July 2, 1941, at which it was intended that a statement would be submitted on behalf of Pan American Airways Corporation setting forth its position with respect to such proposal, and that it was expected that the representatives of W. R. Grace & Co. at
372 such stockholders' meeting would submit a statement on behalf of that Company respecting such proposal.

At the conclusion of the discussion which ensued, the Board reaffirmed the position which had been previously taken by the Board and the Executive Committee that it would not be in the interest of Pan American Airways Corporation or of Pan American-Grace Airways, Inc., or in the public interest for Pan American Airways Corporation to acquiesce in the proposal.

Upon motion, duly made and seconded, the following resolution was adopted:

> RESOLVED, that the President, or any Vice-President, of this Corporation be, and each of them

hereby is, authorized and empowered, in the name and on behalf of this Corporation and under its corporate seal or otherwise, to execute and deliver a proxy in favor of Geo. L. Rihl, John C. Cooper or J. Clawson Roop, Vice-Presidents of this Corporation, whereby the said Geo. L. Rihl, John C. Cooper or J. Clawson Roop will be authorized to attend a special meeting of the stockholders of Pan American-Grace Airways, Inc. to be held on July 2, 1941, or at any meeting of such stockholders adjourned therefrom, and to vote the shares of stock held by this 374
Corporation in said Pan American-Grace Airways, Inc. at such special meeting to be held on July 2, 1941, and at any meeting adjourned therefrom, and that the Secretary, or any Assistant Secretary, of this Corporation be and each of them hereby is authorized and empowered to affix the seal of this Corporation to such proxy so executed and to attest such seal so affixed (P-37, pp. 21-22, R. 7335-6).

PAN AMERICAN AIRWAYS, INC.
BOARD OF DIRECTORS

December 28, 1938 375

Mr. Trippe reported to the meeting on the status of negotiations with W. R. Grace & Co. It was the sense of the meeting that it would not be in the interest of our stockholders for our directors to authorize an application by Pan American-Grace Airways, Inc. to extend north of Cristobal in competition with Pan American Airways, Inc. (P-37, p. 42, R. 7377).

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W. R. Grace & Co. Exhibit No. G-20.

(R. 5174-7)

Certificate of Incorporation of Pan American-Grace Airways, Inc. (As amended to date) (Excerpt)

FIRST: The name of the corporation is PAN AMERICAN-GRACE AIRWAYS, INC.

SECOND: The principal office of the corporation in the State of Delaware is located at No. 19-21 Dover Green, in the City of Dover, Kent County. The name and address
377 of its resident agent is the United States Corporation Company, No. 19-21 Dover Green, Dover, Delaware.

THIRD: The nature of the business, or objects or purposes proposed to be transacted, promoted, or carried on, are:

(a) To carry, convey, transmit, or transport, as, when and where lawful, goods, freight, express, articles of merchandise of every nature and description, securities, passengers, mails and intelligence by means of air craft.

(b) To design, manufacture, assemble, build, re-
378 pair, maintain, operate, own, lease, let, purchase, sell and deal in air craft of every kind and description, by whatever power actuated and by whatever agency or method sustained or stabilized including (without limitation) balloons, dirigibles, aeroplanes, hydroplanes, hydro-aeroplanes, and all kinds and types of vehicles, mechanisms and devices now known or which may hereafter be discovered or invented for navigating the air, for purposes of pleasure, commerce, warfare or otherwise.

(c) To build, acquire, maintain, own, operate, let, lease, sell and otherwise dispose of air navigation facilities of every nature and description, including

(without limitation) terminal landing fields, emergency landing fields, aviation fields, hangars, land lighthouses, storage space, systems of radio, communications, air craft repair stations, mooring masts, landing buoys, air ports, either land or water, plants, works, stations, depots, and all equipment incidental to the proper maintenance thereof, and all other conveniences and appurtenances appropriate to any of its business.

(d) To design, manufacture, purchase, sell and trade in, and to install upon air craft, weapons and 380
armor or other protective coverings, apparatus for measuring height and distance, determining location and direction, and for signalling or communicating in any way, and all apparatus, equipment and devices designed for use in connection with the navigation of the air.

(e) To conduct experiments on its own account and for others, to apply for, obtain, purchase, or otherwise acquire, patents, licenses, trade marks, trade names, processes, improvements, inventions, formulae, and the like, and to sell, mortgage, pledge, let or otherwise dispose of, or deal in, and to use, 381
exercise and develop, grant licenses and other rights and privileges in respect to, and to experiment upon, test or develop any process, improvement, invention, patent, or patent right, or the like.

(f) To purchase, lease, hire, or otherwise acquire, hold, own, develop, operate, improve, sell, assign, transfer, exchange, mortgage, pledge or otherwise dispose of, or turn to account and convey, and to aid and subscribe toward the acquisition, development or improvement of, real and personal property and rights and privileges therein of every nature whatsoever, whether tangible or intangible in the State of

382 *W. R. Grace & Co. Exhibit No. G-20.*

Delaware, and in all other states, territories, districts, colonies, and dependencies of the United States of America and in all foreign countries, including the good will of any corporation, copartnerships and/or individuals, suitable or convenient for any business of the corporation; and to acquire, take, hold, own, construct, erect, improve, manage, and operate, and to aid and subscribe toward the acquisition, construction or improvement of, buildings, mills, storehouses, warehouses, factories, ma-
383 chinery, apparatus, equipment, locomotives, cars, and other rolling stock, roads, bridges, docks, piers, wharves, ships, vessels, boats, dry and floating docks, marine railways, trucks, wagons, cars, and other vehicles, engines, motors, conveyances, rolling stock and other works, property or appliances which may appertain to or be useful in, the conduct of any business of the corporation but only to the extent authorized by the laws of the State of Delaware.

(g) To acquire by purchase, subscription, or otherwise, and to hold, sell, assign, transfer, exchange, lease, mortgage, pledge, or otherwise dis-
384 pose of, any shares of the capital stock of, or voting trust certificates for any shares of the capital stock of, or any bonds or other securities or evidences of indebtedness issued or created by, this corporation or any other corporation or association organized under the laws of the State of Delaware or of any other state. territory, district, colony or dependency of the United States of America, or under the laws of any foreign country; to pay therefor in cash or property or to issue in exchange therefor shares of the capital stock, bonds or other obligations of this corporation; and, while the owner or holder of any such shares of capital stock, voting trust certificates, bonds or other obligations, to possess and exercise

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in respect thereof any and all rights, powers and privileges of individual holders, including the right to vote on any shares of stock so held or owned (provided, however, that this corporation shall not use its funds or property for the purchase of shares of its own capital stock when such use would cause any impairment of its capital, and provided further that shares of its own capital stock belonging to this corporation shall not be voted upon directly or indirectly); and upon a distribution of the assets or a division of the profits of this corporation, to distribute any such shares of capital stock, voting trust certificates, bonds, or other obligations, or the proceeds thereof, among the stockholders of this corporation. 386

(h) To organize subsidiary corporations and to convey and assign all or any part of the assets to any such subsidiary corporation or corporations in exchange for shares of the capital stock or other securities of such subsidiary corporation or corporations.

(i) To acquire, from time to time, in exchange for shares of the capital stock of this corporation as herein fixed or as may hereafter be increased, such property or shares of the capital stock of any other corporation or corporations, as the Board of Directors shall deem of advantage to this corporation, at such valuation of the property or shares so acquired as in the judgment of said Board of Directors shall be fair and just. 387

(j) To purchase, lease, or otherwise acquire, in whole or in part, the business, good will, rights, franchises, and property of every kind, and to undertake the whole or any part of the assets or liabilities of any person, firm or association or corporation,

engaged in or authorized to conduct any business authorized to be conducted by this corporation, or owning property necessary or suitable for its purposes, and to pay therefor in cash or in stock or bonds, or any other evidences of indebtedness of this corporation or otherwise; to hold or in any manner dispose of the whole or any part of the business, good will, rights, franchises, or property so acquired and to exercise all the powers necessary or incidental to the conduct of such business.

389 (k) To borrow or raise moneys for any of the purposes of this corporation, issue bonds, debentures, notes or other obligations of any nature, or in any manner, for moneys so borrowed, and to secure the payment thereof and of the interest thereon, by mortgage upon, or pledge or conveyance or assignment in trust of, the whole or any part of the property of this corporation, real or personal, including contract rights, whether at the time owned or thereafter acquired, and to sell or pledge such bonds or notes or other obligations of this corporation for its corporate purposes.

390 (l) To aid, in any manner, any corporation or association any of whose shares of stock, bonds, or other evidences of indebtedness are held by or for this corporation, or in which, or in the welfare of which, this corporation shall have any interest, and to do any acts or things designed to protect, preserve, improve or enhance the value of, any such shares of stock, bonds or evidences of indebtedness, or the property of this corporation.

(m) To guarantee the payment of dividends upon any shares of the capital stock of, or the performance of any contract by, any other corporation or association in which, or in the welfare of which, this

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corporation has an interest, and to endorse or otherwise guarantee the payment of the principal and interest, or either, of any bonds, debentures, notes, securities, or other evidences of indebtedness created or issued by any such other corporation or association.

(n) To carry out all or any part of the foregoing objects as principal, factor, agent, contractor, or otherwise, either alone or in conjunction with any person, firm, association or other corporation, and in any part of the world; and in carrying on its 392
business, and for the purpose of attaining or furthering any of its objects, to make and perform such contracts of any kind and description, to do such acts and things, and to exercise any and all such powers, as a natural person could lawfully make, perform, do or exercise.

(o) To remunerate, in cash, shares of stock, bonds, or other securities or evidences of indebtedness or otherwise, any person, firm, syndicate, association, or corporation, for services rendered, directly or indirectly, in selling, placing or guaranteeing the selling or placing of any shares of the 393
capital stock, bonds, debentures, or other securities or evidences of indebtedness, issued, owned or controlled by this corporation or by any other corporation in which this corporation is interested, or in connection with the formation, promotion, or operation of this corporation, or of any other corporation in which this corporation is interested, or in connection with the conduct of the business or affairs or the protection of the property and interests of this corporation.

394 *W. R. Grace & Co. Exhibit No. G-20.*

(p) To conduct its business in all its branches at one or more offices in the State of Delaware and in any or all other states, territories, districts, colonies, and dependencies of the United States of America and in any or all foreign countries.

It is the intention that the objects and purposes specified in the foregoing clauses of this Article THIRD, shall, except where otherwise expressed in this Article, be in no wise limited or restricted by reference to, or inference
395 from, the terms of any other clause of this or any other article in this certificate, but that the objects and purposes specified in each of the clauses of this Article shall be regarded as independent objects and purposes.

It is also the intention that said clauses be construed as powers as well as objects and purposes; and, generally, that the corporation shall be authorized to exercise and enjoy all other powers, rights, and privileges granted by the General Corporation Law, being Chapter 65 of the Revised Statutes, of the State of Delaware, to corporations of this character, as well as all the powers conferred or which may be conferred upon such corporations by the then existing laws of the State of Delaware, so far as not in conflict
396 therewith, or by all laws and acts heretofore or hereafter amendatory of, or supplementary to, said General Corporation Law, or of any or all of said laws or supplements thereto, but the enumeration of certain powers as herein specified is not intended as exclusive of, or as a waiver of, any of the powers, rights, or privileges granted or conferred by said General Corporation Law or the laws of said State now or hereafter in force; * * *

* * * * * *

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W. R. Grace & Co. Exhibit G-22.

(R. 5186)

PAN AMERICAN-GRACE AIRWAYS, INC.

Balance Sheet December 31, 1941

ASSETS

CURRENT ASSETS		
Cash on Hand and on Deposit	$ 406,509.69	
Accounts Receivable:		
Mail Contracts:		398
U. S. Government	575,054.45	
Other Governments	221,855.17	
Other Government Accounts Receivable	101,615.29	
Miscellaneous	16,318.11	
Affiliated and Associated Companies	347,148.48	
Inventories Current	117,774.41	$1,786,275.60
CAPITAL ASSETS		
Airplanes	$1,268,483.89	
Engines	543,211.22	
Hangars, Stations and Airports, etc.	1,420,963.49	
Other Equipment (Flight)	252,847.30	
Construction in Process	109,177.56	$3,594,683.46
		399
Charges Related to Contracts, Leases & Concessions		905,133.75
		$4,499,817.21
SUNDRY ASSETS		
Other Inventories	$ 266,442.98	
Guarantee Deposits	128,484.79	
Prepaid and Deferred Charges	126,516.77	
Cash Reserved for Equipment Purchases	700,000.00	$1,221,444.54
INSURANCE FUND		
U. S. Government Securities	$ 603,349.04	
Cash	323,650.96	$ 927,000.00
TOTAL		$8,434,537.35

400 *W. R. Grace & Co. Exhibit No. G-22.*

LIABILITIES

Current Liabilities

Accounts Payable	$ 556,691.50	
Affiliated and Associated Companies	79,930.75	
Notes Payable	11,049.72	
Reserve for Taxes	566,581.98	
Unearned Passenger Income	180,820.30	$1,401,074.25
Provision for Statutory Compensation of Employees in South America Payable Upon Termination of Employment		$ 196,617.68

401 Reserve for Depreciation and Obsolescence

Airplanes	$ 621,294.89	
Engines	255,137.26	
Hangars, Stations and Airports, Etc.	594,319.55	
Other Equipment (Flight)	135,389.01	
Overhaul Reserve	57,176.56	
Contingencies	240,000.00	$1,903,317.27
Reserve for Contracts, Leases & Concessions		3,123.67
		$1,906,440.94

Reserve for Self-Insured Risks

Balance, January 1, 1941	$ 757,946.64	
Reserved during 1941	188,589.61	
Charges for Losses during 1941	19,601.04	$ 926,935.21

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Net Worth

Capital Stock		$4,000,000.00
Surplus		
As at December 31, 1940	$ 22,788.43	
Profit for Year end. Dec. 31, 1941	680,680.84	
	$ 703,469.27	
Less:		
Transfer to Capital	500,000.00	
	$ 203,469.27	
Less:		
Dividends Paid	200,000.00	3,469.27
		$4,003,469.27
Total		$8,434,537.35

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W. R. Grace & Co. Exhibit G-23.

(R. 5188)

PAN AMERICAN-GRACE AIRWAYS, INC.

Profit and Loss Statement December 31, 1941

INCOME:			
United States		$2,654,084.84	
Foreign Mail	$ 820,488.27		
Less Account U. S. Post Office	476,870.29	343,617.98	
Passengers	$2,105,951.48		
Less Discounts	235,785.81		
Net Passengers		1,870,165.67	
Special Flights		18,571.21	
Baggage		56,934.26	
Express		207,189.40	
Commissions Earned		20,630.76	
Interest Received		6,830.23	
Miscellaneous		105,092.43	
			$5,283,116.78
EXPENSES:			
Aircraft Expense:			
Aircraft Operating		$1,612,744.00	
Depreciation—Flying Equipment		354,411.76	
Ground Expense:			
General		304,490.22	
Traffic		551,910.81	
Operations		708,524.91	
Communications		178,552.81	
Depreciation—Ground Equipment		102,301.43	
Other Expenses:			
Excess Cost DC-4's		120,000.00	
Federal Taxes		549,500.00	
Special Reserve for Development and Contingencies		120,000.00	
			4,602,435.94
PROFIT OR LOSS			$ 680,680.84

406 **W. R. Grace & Co. Exhibit G-75.**

(R. 5507)

October 28, 1942.

L. Welch Pogue, Esq., Chairman,
Civil Aeronautics Board,
Washington, D. C.

Dear Sir:

We wish to confirm our position taken at this morning's conference.

We accept your suggestion in principle and, for the duration of the war, agree to the immediate addition to
407 Panagra's Board of an odd director (satisfactory to both stockholders) who might also serve as Chairman of the Board, with the understanding that this individual will be free to decide independently and without limitation, and on the basis of Panagra's being an independent entity, all matters involving Panagra's operations with regard to which the Pan American and Grace directors may be unable to agree. Such an arrangement accomplishes the same purpose as establishing a voting trust along the lines you suggested, while being less complicated and more easily put into effect.

For reasons pointed out this morning, the suggestion
408 of Pan American that there be an odd director appointed, who would only have "power to break any deadlock on any questions arising in connection with operations of the company *that fall within the scope of the dedication of capital made by the two stockholders*" begs the entire question. Grace and Pan American are not in agreement as to what is the proper scope of the company's operations, and fourteen years' experience has shown that such deadlocks as arise almost invariably revolve around this very issue which Pan American Airways wishes to exclude from the jurisdiction of the odd director.

Very truly yours,

W. R. Grace & Co.
First Vice President.

Copies to:
Pan American Airways Inc.
Pan American Airways Corporation
Henry Friendly, Esq.

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Petition of W. R. Grace & Co. for Review of Orders of the Civil Aeronautics Board. 409

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

W. R. GRACE & Co.,
Petitioner,

against

CIVIL AERONAUTICS BOARD, PAN AMERICAN AIRWAYS CORPORATION, PAN AMERICAN AIRWAYS, INC., EASTERN AIR LINES, INC., NATIONAL AIRLINES, INC., CHICAGO & SOUTHERN AIR LINES, INC., TACA, S. A., DEPARTMENT OF JUSTICE OF THE UNITED STATES OF AMERICA and PAN AMERICAN-GRACE AIRWAYS, INC., 410
Respondents.

Petition of W. R. Grace & Co. for Review of Orders of the Civil Aeronautics Board. 411

To the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit:

The petition of W. R. Grace & Co. respectfully shows to this Court as follows:

1. This petition, filed under Section 1006 of the Civil Aeronautics Act of 1938 (49 U. S. C. A. §646), seeks a review of (1) an order of the Civil Aeronautics Board issued May 24, 1944, and served upon petitioner May 25, 1944, in the matter of the alteration, amendment and modification of the certificate of public convenience and necessity of Pan American-Grace Airways, Inc. under Section 401(h) of the Civil Aeronautics Act of 1938, as

amended, to provide for a route terminal in the United States (being the Board's Docket No. 779), which order dismissed said proceeding for lack of jurisdiction; (2) an order of the Civil Aeronautics Board dated August 5, 1944, denying the petition for reargument and reconsideration of the foregoing order; and (3) an order of the Civil Aeronautics Board, dated December 17, 1943, denying a cross-motion made by petitioner on December 2, 1943, as hereinafter set forth (par. 5(h)).

413 2. Your petitioner, W. R. Grace & Co., is a corporation duly organized and existing under the laws of the State of Connecticut and having its principal office and place of business at 7 Hanover Square, New York, New York. Petitioner and its predecessors have been engaged in business in Latin America, particularly the countries on the West Coast of South America and in Central America, and in trade and transportation between the United States and Latin America, for nearly a century.

3. Pan American-Grace Airways, Inc. (hereinafter referred to as Panagra) is a corporation duly organized in 1929 and existing under the laws of the State of Del-
414 aware. 50% of its capital stock is owned by your petitioner, W. R. Grace & Co., and the other 50% is owned by Pan American Airways Corporation. Panagra operates, under a certificate of public convenience and necessity issued by the Civil Aeronautics Board, air routes in South America between Balboa, Canal Zone, and Buenos Aires, Argentina, via various intermediate points, principally along the West Coast of South America. The Board of Directors of Panagra consists of eight directors, four of whom are associated with W. R. Grace & Co., and four with Pan American Airways Corporation.

4. Upon information and belief: Pan American Airways Corporation is a corporation duly organized and

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existing under the laws of the State of Delaware, having its principal place of business and executive offices at 135 East 42nd Street, New York, New York. In addition to owning 50% of the capital stock of Panagra, Pan American Airways Corporation also owns all of the capital stock of Pan American Airways, Inc., a company engaged in overseas and foreign air transportation, and further owns all or part of the capital stock of various other subsidiaries operating air routes in Mexico, Central and South America and the Caribbean area. Among other routes, 416
Pan American Airways, Inc. operates between Miami, Florida and Balboa, Canal Zone.

5. The nature of the proceedings before the Civil Aeronautics Board, which resulted in the orders of which review is hereby sought, was as follows:

(a) On September 10, 1942, the Civil Aeronautics Board by its order, Serial No. 1928, instituted this proceeding, Docket No. 779, under Section 401(h) of the Civil Aeronautics Act of 1938, as amended (49 U. S. C. A. §481(h)), to determine whether the certificate of public convenience and 417
necessity held by Panagra should be altered, amended and modified so as to extend the route of Panagra from its northern terminal at Balboa, Canal Zone, to a terminal in the United States at Miami or Tampa, Florida, New Orleans, Louisiana, Brownsville or El Paso, Texas, Los Angeles, California, or at two or more of said points. Said order of the Board made Panagra, W. R. Grace & Co., and Pan American Airways, Inc. parties to the proceeding.

(b) By its order, Serial No. 1991, dated October 22, 1942, the Board amended its previous order so as to limit the terminals under consideration to Miami, Tampa and St. Petersburg, Florida.

(c) Pan American Airways Corporation, Eastern Air Lines, Inc., National Airlines, Inc., Chicago & Southern Air Lines, Inc., TACA, S. A., and the Department of Justice were permitted to intervene in this proceeding by permission of the Civil Aeronautics Board.

(d) This proceeding came on for hearings before Assistant Chief Examiner Francis W. Brown, and Examiner Vincent Gingerich on September 15, 1943,
419 and said hearings continued from day to day until October 23, 1943. At said hearings W. R. Grace & Co. strongly supported the proposed extension of Panagra, and Pan American Airways Corporation at all times opposed the same. Panagra maintained a neutral position for reasons hereinafter set forth (par. 6 (g)).

(e) At the opening of the hearings on September 15, 1943 Pan American Airways Corporation made a motion to dismiss this proceeding for lack of jurisdiction of the Civil Aeronautics Board. Said motion was denied by the Civil Aeronautics Board by its
420 order, Serial No. 2448, dated September 23, 1943, without prejudice to its renewal at the close of the hearing.

(f) At the close of the hearing on October 23, 1943, Pan American Airways Corporation renewed said motion to dismiss the proceeding for lack of jurisdiction of the Board. The ground of the motion was that the Civil Aeronautics Act did not give the Board any power at all under any circumstances to "require a carrier to operate in a different territory from that specified in its certificate."

(g) On November 24, 1943, the parties were advised by the Board that the Board would hear oral

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argument on the motion of Pan American Airways Corporation to dismiss the proceeding for lack of jurisdiction.

(h) On December 2, 1943, W. R. Grace & Co. filed a cross-motion requesting that argument on the motion of Pan American Airways Corporation be deferred until final argument on the merits, subsequent to the filing of the Examiners' report, on the ground that the motion would involve a consideration of issues of fact which would require a thorough study and briefing of the evidence, as the issues on the jurisdictional facts overlapped the issues on the merits. This cross-motion was denied by the Board's order, Serial No. 2586, dated December 17, 1943.

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(i) Briefs on the motion to dismiss were filed by the parties about January 15, 1944, and oral argument was heard by the Civil Aeronautics Board on January 31, 1944.

(j) The Board handed down its opinion and order, Serial No. 2867, on May 24, 1944, served upon petitioner May 25, 1944, granting the motion of Pan American Airways Corporation to dismiss the proceeding for lack of jurisdiction, and dismissing said proceeding, Docket No. 779. In its opinion, the Board found that Section 401 (h) of the Civil Aeronautics Act did confer upon it the power to amend the certificate of public convenience and necessity of an air carrier so as to require it to extend its route, even though said carrier had not itself filed an application for such route extension. However, the Board went on to find that the particular extension of Panagra's route proposed in this proceeding was beyond its power and jurisdiction for the following reasons: (1) because the extension would involve a

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basic transformation of the character of Panagra in that it would have direct access to a United States terminal, and would no longer be dependent upon Pan American Airways, Inc. for the transportation of traffic between the United States and Balboa, Canal Zone, (2) because of the length of the proposed route extension, approximately 1,200 miles, and (3) because of the amount of the capital investment required for the proposed route extension, approxi-
425 mately $800,000.

(k) On June 23, 1944, W. R. Grace & Co. filed with the Civil Aeronautics Board a petition for reargument and reconsideration of the opinion and order aforesaid. Said petition was filed pursuant to Section 285.8 of the Economic Regulations of the Civil Aeronautics Board, which provides that any party may petition for rehearing, reargument or reconsideration of any final order of the Board within 30 days after service of the order.

(l) On August 5, 1944, the Civil Aeronautics Board issued its order, Serial No. 3049, denying the
426 petition of W. R. Grace & Co. for reargument and reconsideration of the Board's opinion and order dismissing the proceeding. There was no supplemental opinion.

6. Your petitioner has a substantial interest in the orders of the Board, the review of which is sought herein, by virtue of the facts hereinabove and hereinafter set forth:

(a) W. R. Grace & Co. was made a party to this proceeding by the order of the Board.

(b) W. R. Grace & Co. owns 50% of the stock of Panagra. Four of the eight members of the Panagra

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Board of Directors are associated with W. R. Grace & Co. The President, a Vice President, and the Secretary of Panagra are all Vice Presidents of W. R. Grace & Co.

(c) During the six weeks of hearings before the trial examiners, W. R. Grace & Co. presented the complete case for the proposed extension of the Panagra route and vigorously supported the extension. On the argument of Pan American's motion to dismiss for the lack of jurisdiction, W. R. Grace & Co. took the position that the Board had jurisdiction to require the proposed route extension. Over a period of several years W. R. Grace & Co. has expended a substantial amount of money and devoted a considerable amount of time and effort through principal executives to the end of securing the extension of Panagra's route to a United States terminal.

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(d) W. R. Grace & Co. has spent the 16 years since the organization of Panagra and its predecessors in vigorously pushing its growth and development. The Panagra route has expanded from 600 miles to its present route of almost 9,000 miles—an international trunk route serving eight countries and the Canal Zone.

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(e) W. R. Grace & Co. believes not only that the proposed extension of Panagra's route would be financially profitable to Panagra, and thus to its stockholders, but it further believes that if Panagra does not secure a terminal in the United States its traffic, and consequently its financial position, would be very seriously weakened, and the West Coast of South America route to Buenos Aires will not be able to maintain its competitive position with the East Coast route, 100% owned by Pan American

Airways, Inc. and operated direct from a gateway in the United States.

(f) This appeal raises the extremely important question of the interpretation of Section 401(h) of the Civil Aeronautics Act of 1938, as amended, and of the jurisdiction of the Civil Aeronautics Board to amend the certificate of public convenience and necessity of an air carrier so as to require the extension of its route in the public interest when the carrier has
431 not filed an application therefor. This question vitally affects the public interest and the future air service pattern of American flag air carriers and should be passed on by this Court. The opinion and order of the Board, which result in a narrowing and stultifying interpretation of the extent of the Board's jurisdiction under the provisions of the Civil Aeronautics Act, can be reviewed only upon this petition by W. R. Grace & Co.

(g) The "substantial interest" of your petitioner is all the more apparent in this case, inasmuch as Panagra cannot act for itself here. Pan
432 American Airways Corporation, controlling 50% of Panagra's Board of Directors, refuses to permit that company to make an application placing before the Civil Aeronautics Board the question of a United States terminal. Likewise, Pan American has refused to permit Panagra to be represented in this proceeding by independent counsel, free to act on its behalf. Certainly Pan American should not be permitted to continue to profit by its own wrong.

7. Your petitioner respectfully petitions for a review of said orders of the Board under Section 1006 of the Civil Aeronautics Act of 1938, as amended, and that upon such review, the Court set aside such orders and direct the Civil

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Aeronautics Board to reinstate said proceeding, Docket 779, and to proceed further with a consideration of the facts to determine whether or not, under all the facts and circumstances set forth in the record, the extension of Panagra's route involved in this proceeding is reasonable and thus within the jurisdiction of the Board. And for the grounds of said petition, your petitioner respectfully states that on the record and proceedings before the Board and in the decision and final orders set out above, manifest errors occurred to the prejudice of the petitioner, and this petition assigns the following errors:

A. The Board erred in dismissing the proceeding, as the argument upon the motion involved only a preliminary general question of statutory interpretation, upon which the Board found in accord with the contentions of your petitioner.

(1) The Board erred in ruling upon the application of its power to this particular extension, a question not before the Board on the argument of the motion of Pan American Airways Corporation.

(2) The Board erred in deciding the motion upon factual grounds when the motion and the argument thereon was presented as a purely legal question of statutory interpretation, excluding the question of the application of the law to the facts of this particular case.

(3) The Board erred in deciding the motion upon factual grounds as to which the parties had been given no opportunity to be heard, to present briefs, oral arguments and to analyze the extensive record.

B. The Board erred in deciding that as a matter of law, and regardless of the evidence in the record, the pro-

posed Panagra extension was beyond its power and jurisdiction.

(1) The Board erred in deciding upon the facts mentioned in its opinion, that the proposed Panagra extension is *per se* unreasonable and beyond the Board's power.

(2) The Board erred in concluding that it was without jurisdiction to amend Panagra's certificate so as to require the proposed extension of its route
437 to the United States (a) because the character of Panagra would be basically transformed by the proposed extension, (b) because of the length of the proposed extension, and (c) because of the amount of capital investment required for the proposed extension, or on any of these grounds.

(3) The Board erred in concluding that the proposed route extension would constitute such a basic transformation of the character of Panagra as to put the proposed extension beyond the power and jurisdiction of the Board solely because said ex-
438 tension would give Panagra direct access to the United States, and direct connection with United States domestic carriers, and would eliminate Panagra's dependence upon Pan American Airways, Inc. as a connecting carrier.

(4) The Board erred in departing from the principle which it had adopted in this decision as to the scope of and limits upon its power to require route extensions—namely, reasonableness under all the facts and circumstances.

C. The Board erred in taking into consideration, as bearing on its jurisdiction under Section 401(h) of the Civil

Aeronautics Act, any controversy between the co-owners of Panagra.

D. The Board erred in denying the cross-motion of petitioner, made December 2, 1943, to defer argument on the motion to dismiss until final argument on the merits, which cross-motion was made on the ground that a consideration of the evidence in the record was necessary for both.

E. The Board erred in denying the petition of W. R. Grace & Co. for reargument and reconsideration of the Board's decision and order, and in failing to reinstate the proceeding and to direct a presentation of briefs and argument on the jurisdictional facts.

8. This petition could not have been filed within 60 days from the date of service of the original order of the Board dismissing said proceeding, namely, May 25, 1944, inasmuch as the order of the Board denying W. R. Grace & Co.'s petition for reargument and reconsideration was not made until August 5, 1944. Your petitioner had, in effect, been compelled to apply for reargument and reconsideration of the Board's order by virtue of the provision of Section 1006(e) of the Civil Aeronautics Act as amended (49 U. S. C. A. §646(e)) providing that no objection to an order of the Board shall be considered by the Court unless such objection shall have been urged before the Board. The points urged in this petition against the original order of the Board dated May 25, 1944 could not have been made before the Board except by petition for reargument and reconsideration, and they were so made. Your petitioner submits that the 60 days within which this petition must be filed runs from the time of the order denying reargument and reconsideration, rather than from the date of the Board's first order dismissing the proceeding (*Saginaw Broadcasting Co.* v. *Federal C. Com'n*,

96 F. (2d) 554). In any event, your petitioner submits that the facts herein stated constitute reasonable grounds for not filing the petition at an earlier date, and, if necessary, your petitioner respectfully requests leave of this Court to file this petition, all as provided in Section 1006(a) of the Civil Aeronautics Act.

Wherefore, your petitioner prays that said orders of the Civil Aeronautics Board be reviewed by this Court, that a copy of this petition be transmitted to the Board
443 and that a transcript of the record upon which said orders were rendered, be thereupon served and filed by the Board in this Court in accordance with Section 1006(c) of the Civil Aeronautics Act of 1938, that upon such review said orders be set aside by this Court and the proceeding, Docket 779, be reinstated, that the Civil Aeronautics Board be required to proceed therein to consider whether, in the light of the facts and circumstances set forth in the record, the proposed extension is reasonable and thus within the Board's jurisdiction, and that petitioner have such and other further relief as to the Court may seem just and proper in the premises.

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Dated, October 3, 1944.

W. R. Grace & Co.,

By J. T. Kirby,
Vice President.

Wright, Gordon, Zachry, Parlin & Cahill,

By John T. Cahill,
Attorneys for Petitioner,
63 Wall Street,
New York 5, New York.

Petition of W. R. Grace & Co. for Review of Orders of the Civil Aeronautics Board. 445

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

J. T. KIRBY, being duly sworn, deposes and says: That he is a Vice President of W. R. Grace & Co., the petitioner herein; that he has read the foregoing petition and knows the contents thereof; that the same is true to his knowledge, except as to matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true; that the reason why this verification 446
is made by deponent and not by the petitioner is that the petitioner is a corporation and deponent is an officer thereof, to wit, a Vice President.

J. T. KIRBY.

Sworn and subscribed to before me, }
this 3rd day of October, 1944. }

CATHERINE L. PURCELL,
Notary Public.
Kings Co. Clerk's No. 375, Reg. No. 138-P-5
New York Co. Clerk's No. 323, Reg. No. 228-P-5 447
Nassau Co. Clerk's No. 18-P-45
Commission expires March 30, 1945

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In the United States Circuit Court of Appeals for the Second Circuit

No. 19520

W. R. GRACE & CO., PETITIONER

v.

CIVIL AERONAUTICS BOARD, PAN AMERICAN AIRWAYS CORPORATION, PAN AMERICAN AIRWAYS, INC., EASTERN AIR LINES, INC., NATIONAL AIRLINES, INC., CHICAGO & SOUTHERN AIR LINES, INC., TACA, S. A., DEPARTMENT OF JUSTICE OF THE UNITED STATES OF AMERICA AND PAN AMERICAN-GRACE AIRWAYS, INC., RESPONDENTS

APPENDIX TO BRIEF OF RESPONDENT CIVIL AERONAUTICS BOARD

EXCERPTS FROM TRANSCRIPT OF HEARINGS BEFORE TRIAL EXAMINERS OF THE CIVIL AERONAUTICS BOARD, SEPTEMBER-OCTOBER, 1943

CROSS EXAMINATION OF CHRISTOPHER DE GROOT

S. M., page 107, line 21, to page 108, line 27:

Q. I will rephrase the question. What is the public relations and publicity organization which handles Panagra work?

A. Pan American Airways has an advertising department under Mr. Walker who, in turn, is under Mr. Chenea, and a public relations department under Mr. Van Duzer. Certain advertising and public relations work for Panagra is supposed to be handled by those departments. In Panagra's own name which is handled by Panagra directly by me and there is certain—there are certain public relations functions at times

which are handled directly by Panagra in which case they are handled directly through me.

Q. Panagra has no separate advertising department, as such?

A. Unless you would call it a one-man department.

Q. Meaning yourself?

A. Yes.

Q. Now, Mr. DeGroot——

Mr. FRIENDLY. Mr. Reynolds, I wonder if, in the interest of clarity, it wouldn't be well to have it appear that all these questions that have just been asked refer to activities in the United States. I assume that is clear, but I think the questions have been more generally phrased.

Mr. REYNOLDS. I will put a question to clear that up.

By Mr. REYNOLDS:

Q. Mr. De Groot, does the Panagra organization maintain personnel and carry on its own public relations and publicity work in South America?

A. Yes, it does.

Q. The answer that you gave as to your functions relate only to activities in the United States?

A. That is correct.

S. M., page 132, line 16, to page 132, line 24, and page 133, line 21, to page 134, line 16:

Q. Referring now to the exhibit which has been marked No. P–53 for identification, which we loosely refer to as the embargo letter, I didn't quite understand your testimony yesterday, Mr. DeGroot, upon the necessity for this letter. Did you testify that prior to the issuance of this letter there was an understanding among shippers that an embargo applied to the West Coast?

A. There was an understanding that an embargo applied to all South American air express.

Q. The question is just was this letter sent to the West Coast shippers?

A. This letter was sent to all shippers.

Q. By whom?

A. By Pan American Airways; by Mr. Cholot's office.

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Q. Did Panagra get out such a letter in its own name?

A. Panagra does not act in the United States in connection with the solicitation for handling of express. That is a function taken over by the express department of Pan American Airways.

Q. Did you have anything to do with the drafting of this letter?

A. I did not have anything to do with the drafting of the letter, but I discussed with Mr. Cholot the desirability of the next to the last paragraph.

Q. Did you request that the letter show that it is sent in the name of Pan American-Grace as well as Pan American Airways or not?

A. I don't believe so, because the letter being sent to shippers who, in the first instance, turned their shipments over to the Railway Express Agency in the United States, which, in turn, turns it over to Pan American Airways in Miami, any mention of Panagra at that point would confuse the issue.

S. M., page 138, line 23, to page 140, line 19:

Q. The next exhibit is Item 4 of PG–4, in which you set forth comparison of rates or fares as existing for Panagra operations prior to March 3, 1943, and subsequent to March 3, 1943. Do you have anything to do with setting the new rates and fares? Is that within the scope of your duties?

A. In collaboration with other officials.

Q. When these were made effective—that is, March 3, 1943, was there a general rate structure revision throughout the Pan American Airways operation also?

A. There was a partial revision of Pan American Airways rates at that particular time.

Q. When you prepared these new rates and fares, did you clear them with any of the representatives of Pan American Airways?

A. Yes. As a matter of fact, they collaborated on the calculations of the new fares, because many of them involved connecting fares and in a number of cases there are competitive rates via alternate routes which are partly or wholly under the jurisdiction of Pan American Airways.

Q. Such as the rate from Miami to Buenos Aires——

A. To Buenos Aires.
Q. On either coast?
A. On either coast.
Q. That rate was set the same for either rate?
A. That is correct.
Q. It was set the same for a good many years?
A. That is right.
Q. There was also a competitive rate to a certain extent between Miami and Cali as compared to the Panagra operation and the operation of Avianca.
A. That is correct.
Q. And that was set the same?
A. And that was set the same.
Q. And has so been for many years?
A. Yes.
Q. As a matter of fact, in setting new rates for Panagra, are they always cleared with Pan American Airways, Inc.?
A. Yes.
Q. How do you know that is done?
A. Because of the fact that almost any fare that is quoted in the tariff—I mean fares are quoted from any point on Pan American Airways System to any other point and the rate structure being very closely related, it is only natural that the matter should be discussed with corresponding Pan American Airways officials.
Q. Do you know of any existing objection upon the part of Panagra to clear with Pan American before setting a change in a local rate in a South American operation, between two South American points?
A. If it is a purely South American operation, there would be no particular objection to clear it, but, as a matter of practice, it usually would be done.

CROSS-EXAMINATION OF GUSTAVO VIDAL

S. M., page 463, line 1, to page 463, line 3, and page 463, line 22, to page 463, last line:

Q. You have actually moved your office to the Grace Building in Hanover Square, haven't you?
A. I did in, I believe, February of last year.

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A. The officers of Pan American-Grace Airways, officers and employees of Pan American-Grace Airways, number in the neighborhood of about 35 people.

Mr. FRIENDLY: That is, in New York?

The WITNESS. In New York, and of that number of people I am the only one who has his desk at the offices of one of the parent companies. The other 34 have their offices at the desks of the other parent company.

S. M., page 487, line 13, to page 488, line 16:

Q. Well, Pan American-Grace is in the market for obtaining shipments of platinum from Buenaventura, or was when it operated through that point, was it not?

A. Yes. We were in the market and our rates for the carriage of air express are those established by the air express department of Pan American Airways, and to the best of my knowledge and belief they are the same rates that they use. To that extent we were in the market at those rates.

Q. Now, let's take the rate from Buenaventura to Miami at the time when you operated. Is it your testimony that Pan American-Grace had nothing to say about the air express rate between Buenaventura and Miami?

A. My understanding is that the rates for the entire group of companies, including Panagra, were established by Pan American Airways on a mileage basis. We cooperated with them to the extent of providing them with the data that they may need, and any suggestions and comments that we may have, but in the main I should think that the air express department of Pan American Airways was the guiding fact of establishing the rates.

Q. Did you feel free to go to the express department of Pan American Airways and ask that they enable you to make a change in the rate?

A. I think every time there has been a question of the rate come up I have discussed the matter with the air express department of Pan American Airways, and to the best of my recollection they are very loath to change established rates.

They believe in adhering to tariffs unless there is a reason for change in the whole structure.

I don't believe they are in favor of making exceptions.

S. M., page 579, line 22, to page 580, line 18:

Q. Regarding platinum shipments, a letter dated November 13, 1935, the third paragraph discusses insurance arrangements. Tell us by whom insurance arrangements on such shipments were made, if you know.

A. Insurance arrangements with regard to air express shipments are handled by the Air Express Department of Pan American Airways.

Q. Do you take any part in that?

A. Occasionally. I did in those days. Less frequently now. The points that I discussed either with Pan American Airways or with the underwriters were those that arose in connection with our own problems; but the rates are uniform.

Q. Uniform for what?

A. For both companies.

Q. For the entire Pan American System including Panagra, do you know, or is it just Pan American Airways, Inc., and Panagra?

A. Well, I say that they are uniform for the Latin American services of both companies. There might be some differences in connection with trans-Atlantic, transoceanic services. That I am not aware of.

Q. Those insurance contracts then for Latin American services which apply to Panagra are negotiated and entered into by Pan American?

A. That is right.

CROSS-EXAMINATION OF HAROLD J. ROIG

S. M., page 1104, line 26, to page 1105, line 11:

Q. Panagra doesn't have any established organization or facilities now for selling its own tickets in the United States, has it?

A. No.

Q. Pan American does sell Panagra tickets?

A. Well, directly and indirectly. The Pan American traffic department have complete supervision of all of our ticket sales in the United States. The actual sales are made in part by the Pan American offices, in part by the travel agencies, in part by steamship lines, including the Grace

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Line, and others—the usual outlets for ticket sales, but the matter is all under the general jurisdiction of Pan American's traffic department working in cooperation with Mr. deGroot in the manner which he described when he was on the stand.

S. M., page 1210, line 22, to page 1210, line 26, and page 1211, line 27, to page 1212, line 19:

Q. Pan American still publishes a system timetable, though, including Panagra, does it not?

A. That is right, and part of our fee includes the portion of the expense corresponding to inclusion of Panagra in that timetable.

Q. Just one final question on that subject: You have no objection to the arrangement whereby the timetable does not definitely show where Pan American ends and where Panagra begins?

A. No; beyond the fact that it does show it up at the top of the column there. It says Pan American-Grace Airways, Cristobal-Buenos Aires, on some of these. I think for the purposes of a large compilation, such as the system timetable, that might be considered adequate.

Q. Panagra occasionally has put out publicity in South America, Mr. Roig, has it not, where it mentions the fact of its affiliation with the Pan American Airways System?

A. Oh, yes.

Q. Is that done with your approval?

A. I don't think I have ever objected to it.

Q. Well, do you find a particular advantage in that?

A. Well, at times there may be some advantage. It is a question about which there is room perhaps for some difference of opinion; on the over-all question my own opinion is rather clear.

DIRECT EXAMINATION OF JUAN T. TRIPPE

S.M., page 1731, line 9, to page 1733, line 1:

By Mr. FRIENDLY:

Q. What other specific benefits has Pan American-Grace received as a result of its affiliation with the Pan American Airways System?

A. These benefits are too numerous to mention here except in most general terms, with a few illustrations. In dollars and cents, the most direct benefit has come from Pan American's traffic and sales organization. There are literally hundreds of travel and tourist agencies throughout the United States that act under Pan American's supervision as sales representatives for the Pan American Airways System. These arrangements have been developed by years of effort, these agencies are serviced by a well organized system of district traffic offices, located in the largest travel markets in the country.

The sales organization has given Pan American-Grace equal representation with every other part of the Pan American Airways System and in our judgment deserves a considerable portion of the credit for the financial success of Pan American-Grace's operations. Had Pan American-Grace been an independent airline it could not have had a sales representation anything like what it has received.

I don't see how, for example, its schedules, routes, and tariffs could have been better publicized than through their inclusion in the Pan American System timetables of which over 600,000 have gone out annually for many years, first on a quarterly basis and later on a monthly basis. I will not stop to dwell on the numerous efforts that Pan American's traffic department has made over a long period of time to foster the development of South American air travel, by Around South American tours and the like.

I would, however, like to list some of the techniques and procedures which have been originated by Pan American Airways and passed on to Pan American-Grace as an integral part of the system. They include the development of the combination ticket and exchange order which makes it possible to route traffic between South America and points on the 18 domestic airlines in the United States in addition to points on connecting railroad and steamship lines; the years of work and effort that have been put into the development of its ticket and ticket contract which afforded the maximum protection to which the international air carriers are entitled under the governing international conventions; the development of the valuable business in credit sales under Pan American's credit and

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transportation contracts; the origination and development of a most successful reservation code which now forms the basis of the American Air Traffic Conference Code, and the establishment of the area reservations control system. All these Pan American-Grace has taken full advantage of and properly so. S. M., page 1734, line 8, to page 1736, last line:

By Mr. FRIENDLY:

Q. Will you also briefly summarize and illustrate the benefits which Pan American-Grace has derived from its affiliation with the Pan American Airways System in the technical field such as operations and maintenance?

A. From the very outset the operations of Pan American Airways have served as a practical clinic in the development of international air transportation. Not only has this been so——

Mr. CAHILL: I am awfully sorry and I do apologize, but will you give me that question, please?

(The question was read by the reporter.)

A. (Continuing.) Not only has this been so with respect to the art of aircraft operation itself, but it has been equally true in matters such as maintenance procedures, the development of pilot training techniques, including pioneering in blind flying, the development of training programs for maintenance personnel, and the development and application of radio and meteorology to international aviation, plus many other technical matters too numerous to mention.

That, alone, however, is only half of the story, for, in addition to being an aviation clinic, the system also has been the foremost aviation research laboratory in the air transport industry. We believe, with considerable pride, that through its engineers, Pan American has had much to do with such improvements as the increase in horsepower output of engines, the lowering of fuel consumption, the development of more efficient propellers, the elimination of fire hazards in aircraft and the improvement in aviation fuel and lubricating oils. From all of these research projects Pan American-Grace has benefited.

I have given a general outline of the various technical fields in which Pan American has been able to afford Pan American-

Grace the benefits of its experience and research. I would like to mention, however, a few specific instances of this nature.

They have, of course, occurred from the very time of the organization of the joint west coast operation. When eventually radio facilities were installed on the Pan American-Grace line a good part of the equipment was developed and manufactured by Pan American Airways and with it went trained system radio operators. The system brought to Pan American-Grace the desirability of establishing our procedure for the collection of weather information and we furnished them with their first meteorologist. Afterward, when we had satisfied Pan American-Grace as to the desirability of employing a weather forecaster, he likewise was furnished from our staff.

We developed in connection with the manufacturers the first streamlined loop direction finder and cooperated with Pan American-Grace in the installation of such equipment on its planes. The same is true, I believe, of the system's original development of the gasoline dump valve which has had such an important effect upon provisional loads.

Just as one illustration of the laboratory research work that I have mentioned before, I would like to refer briefly to the studies which we have caused to be made with respect to the subject of flight crew fatigue. This research made by the system medical director, Dr. McFarland, includes investigations of the effects of high altitude operation in the Andes. This resulted in the development of certain techniques for combatting fatigue and keeping fit for flying thus increasing safety in air transport.

We made application of our findings by establishing field medical centers at the main system bases of operation to improve the physical fitness of ground as well as flight personnel. In the development of this medical program and as in many other similar instances, Pan American-Grace has had the opportunity of fully sharing in the benefits to be derived therefrom.

Pan American-Grace now has its own medical center at its base in Lima which is participating in the cooperative system effort of medical research.

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S. M., page 1740, line 9, to page 1743, last line:

Q. I think we have now reached a point where it is appropriate for me to ask you the question which was suggested be deferred yesterday:

To summarize the reasons why Pan American has refused to consent to Grace's request that Pan American-Grace be authorized to apply for an extension of its route north from the Canal.

A. Pan American Airways, as early as 1927, had taken steps to organize an airline from the United States to the Canal Zone, and from the Canal Zone down the West Coast of South America.

A United States airmail contract between the United States and the Canal Zone was awarded the company in July 1928.

Prior to that time the active steps which I have mentioned have been undertaken by Pan American to provide service along the west coast.

This was all some time before there was any arrangement for any possible participation by Grace and Company.

When Grace and Company finally did come into the picture it was only to take a $25,000 participation in a small company which we were to operate in Peru, with an option to buy a half interest in our west coast airline if they decided to do so at a later date.

It was understood that, in the event Grace should decide to exercise their option, our through airline down the west coast was to be under our management, and there was also a definite understanding outlining the territory to be served by the jointly owned company in relation to other parts of Latin America which were either already served or for which plans were under way on the part of Pan American.

In other words, the airline down the west coast of South America was either to be owned 100 percent by Pan American, or in the event Grace exercised its option it would be owned more by Pan American and up to 50 percent by Grace and Company.

In either event it was to be an integral part of the Pan American system under our operating control, just as much so as the line down the east coast of South America, or any other

of the Latin American trunk line services that Pan American Airways system has developed in South America.

The West Coast airline is an end-on carrier to our trans-Caribbean and Central American services. We have no competitive interests against it.

Every through air passenger down the west coast is a passenger carried over the Pan American lines either across the Caribbean or through Central America, and every through passenger coming from the west coast is a through air passenger over our trans-Caribbean or Central American services.

In this respect our trans-Caribbean and Central American services, together with the west coast service, provide a through Pan American system air service to west coast points and via the west coast to Buenos Aires, just as our service down the east coast of South America provides a through Pan American system air service to east coast points and via the east coast to Buenos Aires, except that Grace, having exercised its option, acquired as our partner on the west coast a 50-percent interest in the profits or losses of that sector.

Grace's suggestion that this west coast line of the Pan American system in which they are given the opportunity to acquire 50 percent of the stock be now made a competitor to Pan American Airways is, in our view, a breach of the agreement between the two companies, which was first made in 1928, and which was reaffirmed in 1929.

If this company, in which Grace has had an option to purchase up to 50 percent were to be extended to Miami the company originally created to serve as our end-on connection for our Miami-Canal Zone service would become the means of destroying that service, at least so far as through traffic to the West Coast of South America is concerned, and thereafter Pan American-Grace Airways would not be part of the Pan American Airways system as it was set up to be, and which it has been all these years, but would be an air line competing with Pan American.

In this respect the effect on Pan American Airways of what is proposed here is quite different from that of the proposal that a competitive outside air line be authorized to fly between

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the United States and the Canal Zone, or even down the West Coast.

Under such a situation Pan American-Grace would continue to be a part, and a most important part, of the Pan American system.

The issue, therefore, as we see it, is not simply whether Pan American-Grace Airways should be allowed to fly between the Canal Zone and Miami in competition with Pan American, but also whether our west coast line now operated by Pan American-Grace Airways should be separated from the system, and Pan American would thereafter be deprived of the benefits of its end-on connection to west coast points which Pan American itself had under way before any arrangement with Grace, and which Pan American-Grace was organized to provide when Grace took up its option.

For these reasons, our directors have felt that the interests of our 9,000 stockholders in every state in the Union would be so prejudiced by this proposal of Grace that we were bound to oppose it in every way.

CROSS-EXAMINATION OF JUAN T. TRIPPE

S. M., page 2159, line 10, to page 2162, line 12:

Q. Your board passes on all purchases of flying equipment, for instance; is that correct?

A. Our company serves as the purchasing agent for the entire system.

For instance, we buy for various of the divisions and we buy also for Pan American-Grace, flight equipment and spare parts—things of that kind—and those contracts represent corporate commitments of the Pan American Airways, Inc., or Corp. usually.

Sometimes they are large enough to require the vendors to get a separate commitment from Corp. on top of Inc. covering the purchase.

Q. As a surety arrangement?

A. As a surety arrangement, yes; and that has been the practice over the years, and as a result both the Pan American-Grace board usually confirm the purchase and the actual com-

mitment is made by Pan American Airways, Inc., with the outside vendor.

Q. Let's take through the typical purchase of say costly equipment. First the matter comes to the Pan American-Grace board, and, assuming that both ownership interests are in agreement, it is approved in such a board meeting.

Then it goes to the board of Pan American Airways, Inc., for approval, and if the item involves the necessity of additional surety or security it goes to the board of Corp. for approval; is that correct?

A. Well, the actual purchase is in the name of Inc. If there is a guarantee by Pan American-Grace, usually the purchase is made without action by the Pan American Airways, Inc., board, unless it has to do with some type of equipment which is usually the case where there has been a purchase on a pooling basis, with the benefit being passed along to all parties concerned in the procurement.

Q. In that case it would go to all three boards, and then the order would be placed?

A. I only recall one or two instances over the years where the manufacturers have asked for formal action by Corp. It is usually only in specific instances, where the commitment runs to a great many millions of dollars, such as the purchase of Constellations—I have that particularly in mind.

Q. How about the DC-4's?

A. I don't think that was covered by the Corp. guarantee.

Q. When all of the boards—or the two boards, if that is all that is necessary in the particular instance—have acted, then isn't the practice to refer the matter to Pan American's Manufacturing and Supply Corporation for the actual placing of the order?

A. Yes. That company functions as an agency, the purpose being to avoid taxes.

In many instances it is necessary to have the purchasing company qualified in the particular state in which the purchase is made, and that company having only a nominal outstanding capital there is a saving to the system of a substantial amount.

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That company functions purely as a vehicle. There is no board action separately by its board, I believe, the board of that company being the executive committee of the system.

Q. The executive committee of Corp. and of Inc.——

A. Yes.

Q. (Continuing.) And Supply all being the same; is that right?

A. That is right.

Mr. FRIENDLY: Mr. Reynolds, I think you inadvertently used the wrong name. It was not the Pan American Aviation and Supply Corporation; it was the company known as Pan American Sales Corporation.

Mr. REYNOLDS: That is right. I am entirely in error, and I shall correct my questions and assume that your answers will be.

The WITNESS: That is correct.

By Mr. REYNOLDS:

Q. The Sales Corporation, however, does or has received commissions of some sort on the purchase of equipment for Panagra. What is the nature of that arrangement, Mr. Trippe?

A. I don't believe there have been any commissions. That is a service rendered as part of our general system service.

If commissions were earned they were included, of course, in the general fees.

Q. In the management fees?

A. In the management fees. I think that the procurement company, and in fact all other agency companies, are departments of the system functioning without profit so far as Pan American-Grace is concerned, in just the same way as they would for other units of the system.

S. M., page 2236, line 17, to page 2236, line 28:

Q. Now, referring to another matter: you came to an understanding early in Panagra's history, did you not, Mr. Trippe, that Panagra would clear with Pan American all mail, passenger, and express rates, so that there would be as few discrepancies as possible between the rate structure of the entire

Pan American system, and you had definite correspondence on that, did you not, Mr. Trippe?

A. I don't recall any incident to which you refer. It is a fact that Pan American, I think, is the nominee of Pan American-Grace that actually files rate tariffs with the Civil Aeronautics Board. I understood that that arrangement is in effect; yes.

REDIRECT EXAMINATION OF JUAN T. TRIPPE

S. M., page 2714, line 15, to page 2715, line 18:

By Mr. FRIENDLY:

Q. Mr. Trippe, was the original participation by the Pan American Airways System in the DC–4 project under a contract made between various air lines and the Douglas Aircraft Company in 1936?

A. That is right. The contract was entered into between Pan American Supply Corporation, Eastern Air, and United, American Airlines, and TWA, all five lines, and the Douglas Company.

Q. That contract called for the production of an experimental ship by the Douglas Company?

A. It did. The contract was entered into, I believe, in 1936 and the ship was developed and flown in the spring of 1939, and it proved unsatisfactory. There was a sum approximating $100,000 which was made up and paid to Douglas by the several air lines, the Pan American System contribution being broken down 5/7 by Pan American Airways and 2/7 by Pan American-Grace Airways.

Q. After the experimental ship was turned down by the air lines, there were various restrictions in the engineering by the Douglas Company; is that correct?

A. That is correct, and Pan American Airways began negotiating for the purchase independent of the other domestic air lines with the Douglas Company in the late fall of 1939.

Q. And then in the spring of 1940 did Pan American enter into a contract with the Douglas Aircraft Company for three DC–4's with an option to acquire three more, the option exercisable by July?

A. That is correct.

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Q. Now, of those six airplanes, three were intended for Pan American-Grace; is that right?

A. That is correct.

DIRECT EXAMINATION OF RICHARD C. LOUNSBURY

S. M., page 2874, line 11, to page 2875, line 17:

By Mr. FRIENDLY:

Q. Does the exhibit which has been marked P-205 correctly summarize your qualifications, experience, and duties?

A. Yes, sir.

Q. Referring to some of the matters that are mentioned in Exhibit P-205 and first to the matters of tariffs, will you please explain what your duties are in connection with the issuance of the tariffs of Pan American-Grace Airways?

A. Of course, the decision as to the actual rates to be charged rests with Pan American-Grace Airways. However, I act as tariff filing and publishing agent with the Civil Aeronautics Board. We also publish the local tariffs and charges throughout the territory covered by the Pan American Airways System. The regulations connected with the tariff, we likewise publish and file with the concurrence of Pan American-Grace.

Q. Now, turning to the subject of the compilation and publication of schedules: Would you indicate what you do with respect to Pan American-Grace?

A. Upon receiving Pan American-Grace's proposed schedules, we handle the mechanical preparation of the schedules for filing with the Civil Aeronautics Board in the Post Office and their publication in the system timetable.

Q. Is it correct to state that ordinarily suggestions for changes in Pan American-Grace schedules do not originate in your office?

A. That is correct. The actual schedule changes are worked out by the officials of Pan American-Grace who send the schedules to us for publication and filing. In some instances, these schedules are such that they affect connecting services of Pan American. If that is the case, the schedules of both companies are discussed with a view to arriving at a satisfactory solution commensurate with the circumstances.

S. M., page 3138, line 14, to page 3139, line 12:

By Mr. KNAUER:

Q. Did you contact various travel bureaus and travel agencies?

A. That is right, I did.

Q. And did you discuss Panagra's service down the west coast with them?

A. Yes; I explained to them all about Panagra's service.

Q. Did you find any of them that hadn't heard the name of Panagra before?

A. Quite a few of them. I would say a majority.

Q. Would you say that the majority were unaware of Panagra's service down the west coast of South America—Buenos Aires, for example?

A. The term "Panagra." They knew there was a service, but they thought it was all Pan American.

Examiner BROWN: They knew there was a service?

The WITNESS: Yes.

Examiner BROWN: They were fully aware of the availability of air service down the west coast?

The WITNESS: Yes; that is right.

Examiner BROWN: But just didn't know it as of Panagra?

The WITNESS: That is right.

Mr. CAHILL: They thought it was Pan American, as I understood the rest of his answer.

The WITNESS: That is right.

Mr. CAHILL: They thought it was all Pan American?

The WITNESS: That is right.

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EXHIBIT P-34

(Furnished by Pan American)

Page 46

AUGUST 31, 1928.

AVIATION CORPORATION OF THE AMERICAS,
100 East 42nd Street,
New York City.

Attention: Mr. J. T. Trippe.

DEAR SIRS:

This will confirm arrangement under which we will associate for the commencement of an airplane service in Peru with the view of ultimately inaugurating a through mail service from the Panama Canal to Valparaiso, Chilce.

A corporation will be formed under the laws of Delaware with a capital stock of $50,000, of which $25,000 will be subscribed by yourselves and $25,000 by ourselves. This corporation will pay to Huff-Daland Dusters, Inc. the sum of $15,000 for an assignment which will convey all of the rights of that company under its present Peruvian mail contract and concession. As soon as possible after the assignment has been completed, operations will be started by this company in Peru and every effort will be made to put the business there on a paying basis.

We will in the meantime cooperate with you in studying the costs of operation on the route from the Panama Canal to Valparaiso and also the advisability of requesting the U. S. post Office Department to advertise for a mail contract on such route and the terms of such advertisement.

If you determine that it is advisable to bid on a contract for carrying the mails between the Panama Canal and Valparaiso, the Delaware corporation above referred to will be used in such service either by an increase in its capital stock to an amount sufficient to operate on the whole route or as a subsidiary operating in Peru. In either event our subscriptions to the stock of the Delaware Company shall be credited at their full amount in the capital set-up of the corporation operating the through service. We shall also have a reasonable time after a study of the estimated costs of such operation to determine what interest, if any, we will take in the company making the bid in addition to our initial investment

of $25,000, such interest not to exceed, however, more than fifty percent of the total capitalization.

You will have charge of the operation of the service from the Canal to Valparaiso and our houses on the West Coast of South America will be the agents of the company on a reasonable compensation basis, such agency to continue during the life of transportation contracts undertaken by the company.

The details of carrying out the above must, of course, be worked out as we go along. We believe, however, that we have stated broadly the basis of our understanding.

Very truly yours,
W. R. GRACE & Co.,
Assistant Secretary.

WFC: GVB.

CORRESPONDENCE

Letter of C. Edward Leasure, Chief Examiner.

DECEMBER 17, 1943.

Mr. H. PRESTON MORRIS,
58th Floor, 135 E. 42nd St., New York, N. Y.
Mr. WILLIAM F. COGSWELL,
7 Hanover Square, New York, N. Y.
Mr. JOHN T. CAHILL,
63 Wall Street, New York, N. Y.
Mr. H. N. DEYO,
64 Water Street, New York, N. Y.
Mr. HENRY J. FRIENDLY,
31 Nassau Street, New York, N. Y.
Mr. E. SMYTHE GAMBRELL,
Citizens & Southern Nat'l Bank Bldg, Atlanta, Ga.
Mr. WILLIAM I. DENNING,
Investment Building, Washington, D. C.
Mr. EDWARD BIERMA,
15 Broad Street, New York, N. Y.
Mr. H. R. BOLANDER, Jr.,
Chicago and Southern Air Lines, Municipal Airport, Memphis, Tenn.
Mr. A. C. WIPRUD,
2736 Dept. of Justice, Washington, D. C.

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Re: Docket No. 779

GENTLEMEN:

As you have been advised, the Board has determined to hear oral argument on the motion of Pan American Airways Corporation to dismiss the proceeding in Docket No. 779, known as the Panagra Terminal Investigation, for want of jurisdiction. On December 3, 1943, W. R. Grace & Company filed a "cross motion" urging the Board to "defer Oral argument on and consideration of the motion of Pan American Airways Corporation to dismiss this proceeding for want of jurisdiction until final argument upon the merits, subsequent to the filing of the Examiners' report." This motion was denied by the Board's order of December 17, 1943.

The oral argument has been assigned for January 31, 1944, in the offices of the Board at 10 a. m. The time and order of presentation of arguments have been assigned as follows: Pan American, 1 hour; Eastern Air Lines, 30 minutes; National Airlines, 10 minutes; Chicago and Southern Air Lines, 10 minutes; W. R. Grace & Company, 1 hour; and Public Counsel, 1 hour. Counsel for Pan American may reserve a portion of his time for rebuttal.

At the suggestion of counsel, the Board will receive briefs on this question in order to facilitate a presentation of authorities and such detailed facts as may be necessary and in order to restrict the time required for the oral presentation. These briefs will be due January 15, 1944, and should not exceed 50 pages.

Very truly yours,

C. EDWARD LEASURE,
Chief Examiner.

C. E. Leasure, 12/17/43,
Office Trial Examiners.
CC: Docket Section
Mails & Files
Mr. Brown.

Letter of Wright, Gordon, Zachry, Parlin & Cahill.

WRIGHT, GORDON, ZACHRY, PARLIN & CAHILL
(Cotton, Franklin, Wright & Gordon)
SIXTY-THREE WALL STREET
New York 5
JANUARY 4, 1944.

Re: Panagra Route Extension
Docket No. 779

DEAR SIRS:

We are in receipt of a copy of a letter of Mr. Gambrell, counsel for Eastern Airlines, dated December 27, 1943.

Mr. Gambrell lists five points which he intends to brief and argue in support of Eastern's motion to dismiss this proceeding.

Points 1 and 5 raised by Mr. Gambrell obviously do not raise any question of the Board's jurisdiction, but involve only the issue as to whether the Board, granting that it has jurisdiction, should amend Panagra's certificate so as to provide for the extension of the route. Inasmuch as the Board has denied the cross motion of W. R. Grace & Co. to join the argument on the jurisdiction question with the argument on the merits, we believe it is clear that argument on Points 1 and 5 listed by Mr. Gambrell have no proper place in the argument now scheduled by the Board.

Point 4 raised by Mr. Gambrell relates solely to the application of Section 408 of the Civil Aeronautics Act in this proceeding. While this does raise in part a question of law, it is an entirely different question from the question as to whether the Board has jurisdiction to order the route extension. Inasmuch as we have not been advised by the Board that the issue of the application of Section 408 is to be considered at this time, we assume that this issue is likewise not properly brought before the Board on this pending argument.

Point 2 involves no question of jurisdiction of the Board, but solely a matter of its discretion, which the Board has, we believe, already conclusively determined.

This leaves only the third point raised in the letter. Even this fails to correctly state the issue now to be argued before

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the Board. The question is not whether the Board lacks power to grant a new route to Panagra for which it has not applied, but rather whether the Board has the power to amend Panagra's certificate so as to provide for the extension of its route from the Canal Zone to a terminal in Florida.

We believe it to be in the interests of proper and expeditious procedure that the issue before the Board on the argument now set for January 31, 1944, be so defined that irrelevant and extraneous considerations such as those raised in Mr. Gambrell's letter will not be brought into the argument and the briefs. This should be done well in advance of the time set for the filing of briefs.

Respectfully yours,

(S) WRIGHT, GORDON, ZACHRY, PARLIN & CAHILL,
Attorneys for W. R. Grace & Co.

CIVIL AERONAUTICS BOARD,
Commerce Building,
Washington 25, D. C.

(CC to all parties.)

NOTICE OF ORAL ARGUMENT

UNITED STATES OF AMERCIA

CIVIL AERONAUTICS BOARD

WASHINGTON, D. C.

Docket No. 779

PAN AMERICAN-GRACE AIRWAYS, INC.

NOTICE OF ORAL ARGUMENT

In the matter of the alteration, amendment, and modification of the certificate of public convenience and necessity of Pan American-Grace Airways, Inc., under section 401 (h) of the Civil Aeronautics Act of 1938, as amended, to provide for a route terminal in the United States.

Notice is hereby given, pursuant to the Civil Aeronautics Act of 1938, as amended, particularly sections 401 and 1001 of said Act, in the above-entitled proceeding, that oral argument on the motion of Pan American Airways Corporation to dismiss the proceeding for want of jurisdiction is assigned to be

held on January 31, 1944, at 10:00 a. m. (eastern war time) in Room 5042, Commerce Building, 14th Street and Constitution Avenue, N. W., Washington, D. C., before the Board.

By the Civil Aeronautics Board:

Dated Washington, D. C., January 10, 1944.

[SEAL] FRED A. TOOMBS,
Secretary.

EXCERPTS FROM GRACE'S BRIEF BEFORE THE CIVIL AERONAUTICS BOARD ON MOTION TO DISMISS, DATED JANUARY 15, 1944, PAGES 34 TO 39, INCLUSIVE

D. The amendment proposed in this case is reasonable

The following facts, taken from the Record in Docket 779 amply demonstrate the reasonableness of an exercise by the Board of its power to "require" Panagra to come through to a Florida terminal.

1. Panagra's Existing Service

Panagra's growth and expansion over the ten-year period 1933 to 1942 effectively demonstrate not only that it is able to undertake additional service without difficulty, but also that the proposed extension is merely a further development in Panagra's natural growth. The following is a brief summary of this development (795–9; Ex. PG–4, Item 5):

	1933	1942
Route Miles	4,581.3	8,581.2.
Airplane Miles	1,102,394	4,093,194.
Passenger Miles	4,806,720	48,538,646.
Frequencies	Twice weekly	Daily (plus additional trips).
Commercial Revenue	$420,000	$4,788,000.
Investment in Aircraft & Ground Facilities	$955,000	$3,791,000.

During this period, the following additional increases are reflected:

Average ton miles	355%
Used ton miles	680%
Passenger revenue	1040%
Express & freight revenue	3160%

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2. Pan American's Traffic on the Miami-Canal Zone Route

The proposed service is on a route on which there already is extremely heavy traffic, with unlimited possibilities of further development. This is apparent from the following statistics on the volume of passenger traffic, mail and express on the Miami-Canal Zone route as operated by Pan American during the years 1940–42 (Exs. P–2; P–14):

SOUTHBOUND

Year	Total passengers carried	Pounds of mail	Pounds of express
1940	1,241	87,986	197,822
1941	2,273	135,764	206,308
1942	6,068	422,809	788,691

NORTHBOUND

1940	1,366	64,907	41,435
1941	2,316	116,388	43,106
1942	7,062	335,370	79,611

3. Extent of Proposed Service

The proposed service is not over a new and uncharted course where unknown navigational, meteorological and other problems might be encountered. It is, as has previously been mentioned, but one stop beyond Panagra's present terminal, involving largely an over-water operation.

The additional mileage represents an increase, on a through operation * between Florida and the Canal Zone, of 1,150 miles (Ex. PG–4, Item 30, p. 12).** This is by no means a formidable addition for a carrier whose route miles have increased from

* This refers to a non-stop operation between Florida and the Canal Zone with DC–4's or other available equipment of that type. DC–4 statistics were used in the exhibits. Ex. PG–4, Item 34, page 3 states, however, that "whatever modern and suitable type of four-motored flying equipment might be available for this operation should be used. It is believed that the corresponding operating figures would be no less favorable than those submitted herein."

** Unless otherwise indicated, all statistics given relate to a terminal at Miami, Florida. Corersponding figures for Tampa will be found in the exhibits.

4,463 in 1929 to over 8,800 in 1943. As previously illustrated, *supra*, pp. 9–10, the character of the proposed operation and not solely the mileage involved is important.

The exhibits are based upon a proposed daily service, which is the same frequency as Panagra now operates on its international trunk route.

4. Expenditure Required

With respect to the expense attendant upon the projected service, the exhibits show (Ex. PG–4, Item 30, pp. 12–13 and Item 34) that the total investment for equipment will amount to $835,000. In connection with this estimated expense, the following facts are significant to note:

(1) The estimates given are of course based upon the high price level prevailing in 1943.

(2) Some of the estimated capital expenditures (e. g., for communications equipment) might be reduced by joint facilities arrangements (452).

(3) The relatively small amount involved is attributable to the fact that there will be fewer stations per route mile on the proposed extension than on the present operations, namely, only one in Florida, and one in Kingston (on the DC–3 operation only), with some possible additional expenditures at Balboa (1461).

5. Financial Condition of Panagra

Panagra is in a strong position to undertake this estimated expenditure. Comparing the financial record of Panagra with any commercial airline in the United States, it is such, in the opinion of the President of the company, that "there is not any airline that can match it" (798).

As of the end of 1942 the company had cash and Government bonds of $2,592,000, total gross assets of $10,754,000 and a net worth, exclusive of goodwill, of $3,900,000. During the ten-year period 1933 to 1942 the company capitalized the sum of $2,850,000 and built up a miscellaneous reserve of $399,000 and a self-insurance reserve of $1,201,000 (796–8; cf. Exs. G–22, G–23).

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The relatively small amount of the capital expenditure required for the permanent operation between Florida and the Canal ($835,000) is apparent when compared with these figures. Moreover, it is less than half the estimated operating revenue for one year.

6. Estimated Revenue, Expenses, and Return Expected

The secure position of the company from a financial standpoint and the estimate of expected revenue from the proposed operation, demonstrate the absurdity of any argument that an order requiring the extension would be a deprivation of property in violation of the due-process clause.

The estimates of Panagra's Vice President and Comptroller envisage an annual revenue of $1,929,500 on the basis of daily service with DC–4's between Miami and Balboa. The estimated annual operating expenses are $1,686,700.

This results in an estimated operating profit, before United States mail but including revenue for the carriage of foreign mail northbound, in the amount of $242,800 * (PG–4, Item 34, p. 3). Of course, the rates which Panagra would receive for carrying southbound mail (including any subsidy) will be determined by the Board. In accordance with established practice, however, such rates would be fixed at a point which would cover Federal taxes and a return on the investment, as well as any possible deficit from operations.

These estimates of revenue to be derived by Panagra on the suggested route are supported by conservative estimates of the passenger, mail, and express traffic to be carried by Panagra (49–50; Ex. PG–4, Items 16 and 20).

As a result of the remarkable growth of Panagra during the past ten years or so, it is the opinion of the operations executives of Panagra that the company is in a better position today than ever before to add more mileage, because it is starting from a higher basis and with a larger organization, with the result that the proposed service will cause no increase in the general and burden expenses of operations (453–4; 601–2).

* On the DC–3 operation from Miami, the estimated operating profit is $37,100. If the operation were from Tampa, instead of Miami, there would be an operating deficit of $10,200 (DC–4 operation) and $181,300 (temporary DC–3 operation).

7. Advantages to the Public

Over 75% of Panagra's passengers carried south from the Canal Zone are received from Pan American at the Canal and approximately the same percentage of those brought to the Canal northbound are transferred to Pan American's respective divisions for carriage to destinations in the United States (Ex. PG–1, Items 1 and 3).

Numerous advantages will accrue to these passengers from an extension of Panagra's route to a Florida terminal.

The advantage of the speedier service on the DC–4 operation which would carry through passengers to Lima from Miami in seventeen hours is, of course, obvious. Under the proposed schedule, the Panagra plane would leave Miami at 00:00, arrive in Balboa at 7:15 and be in Lima at 17:05 (PG–4, Items 17–18).

The manifold advantages from the point of view of passenger comfort and convenience on a through service have been abundantly developed in the record. They include:

(a) Fundamentally, and without stating at length the serious inadequacies of Pan American's connecting service, it would relieve the traveling public of all the disadvantages that inhere in any connecting service and would facilitate and improve the services between the United States and the eight important South American countries on Panagra's route (e. g., a number of delays in arrival are inevitable, being caused by weather, motor trouble, and other factors). Such delays are an inherent defect of a connecting service (223). Apart from the difficulties caused by Pan American's numerous delays (Exs. P–25, P–25A, P–25B), even Panagra delays are proof of the advantages of a Panagra direct through service (792).

(b) It would eliminate passenger discomfort and inconvenience on a night flying operation. A connecting service would require passengers to arise some time before the arrival at Balboa, and transfer from one aircraft to another, instead of continuing the trip as on a

through operation, either asleep or awake, as the passengers might choose (175–6).

(c) Panagra rather than Pan American would control reservations on the Canal Zone-Florida sector, thus preventing international through passengers from being blocked out by local sector traffic (804).

(d) The competition provided by the extension would result in improved service generally, as illustrated by the expedition of Pan American's passenger handling at Brownsville since the advent of the competition of American Airlines on the Mexico service (400).

In addition to these advantages to the traveling public, there would be the following advantages to Panagra itself:

(a) A through service would make possible a *maintenance base* in the United States, nearer and more accessible to the source of supply of skilled labor and of materials and parts—providing an item of economy through the elimination of heavy inventory, rush shipments, etc. Further savings could be obtained on customs duties. It would enable the technical staff to be in closer contact with other experts in the U. S. on special problems that arise in the course of operations (177–8).

(b) It would assist in the procurement of skilled pilots who would be attracted by the possibility of an occasional layover in the United States (177–8).

(c) It would make for a more economical *utilization of equipment* (356–7).

(d) It would result in a *generation of traffic* because of the elements of increased capacity and frequency and of competition (440–1). The fact that transportation via Panagra could be sold on a through basis would also be helpful in the generation of traffic (399–400).

(e) It would facilitate *freight service*. The fewer transfers of freight, the more efficient and less expensive the service becomes. Every time cargo has to be handled the package problem becomes serious and the expeditious character of the service is retarded (806).

Excerpts From Oral Argument Before the Civil Aeronautics Board on Motion to Dismiss, January 31, 1944

Statement by Hon. L. Welch Pogue, Chairman of the Civil Aeronautics Board

S. M., page 2, paragraph 2:

Mr. Pogue: The Board will now hear oral argument on the motion of Pan American Airways Corporation to dismiss for want of jurisdiction the proceeding in Docket No. 779, Panagra Terminal investigation.

Argument by Mr. Harlan (Eastern)

S. M., page 33, paragraph 1, through page 34, paragraph 1:

Mr. Harlan: Mr. Chairman and members of the Board, I am obviously not going to be able to cover all of the points in our argument in 30 minutes and I am going to try not to repeat anything which Mr. Friendly has said, although I agree with practically everything he has said at least, so I just call your attention to our brief in which I think we have outlined in substance practically all of the arguments that we care to make in this proceeding.

The basic question has already been set out by Mr. Friendly, namely, whether Section 401 (h) of the Act gives the Board power to require an air carrier, against its will, to operate a substantial new service—in this case practically 1,200 miles of new route—in a territory which it has never served and which it does not wish to serve.

Public Counsel has suggested in his brief that we should discuss purely the legal question here and not refer to the facts at all.

Now, I don't think that this Board can decide a question of this character in a vacuum. There is no court that I know of that has ever decided a case without reference to the facts, and I think we have to refer to the facts in order to get the legal question in proper perspective.

The question here is whether you are going to dismiss this proceeding, not whether you are going to dismiss some other

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proceeding some time or all proceedings of this type, but just whether you are going to dismiss this particular proceeding, Docket 779, so I think it is necessary to look at the facts.

Just reviewing them briefly so far as we think they are particularly significant: Panagra is equally owned by Pan American and Grace. It operates up and down the West Coast of South America, and to Buenos Aires which is a point on Pan American's route. Pan American is the sole United States operator between the United States and South America; Grace is a large corporation having many interests, one of which is Grace Line, Incorporated, which is a steamship operator between New York, the Canal Zone, and the West Coast of South America.

S. M., page 41, paragraph 1:

I think in this case it seems clear that there is no power in this Board at all to compel Panagra to provide service which it does not wish to provide. Hence it seems to me that it is wholly irrelevant to try to decide whether the particular exercise in this case would be reasonable or not, but even if the rule of reasonableness were relevant in this proceeding—which I think it is not because the Board just lacks the power to do it—would it be reasonable to compel Pan American, for instance, to invest its money in Panagra, just so Panagra can compete with Pan American all the way from Miami to Buenos Aires, and if the question of unwillingness were involved, would it be reasonable to compel Grace to invest in an airline which would compete with it all the way from Miami down the West Coast of South America? Would it be reasonable to require a 1,200-mile extension, or a 1,200-mile new route by a carrier which admittedly cannot operate satisfactorily on its present route, or would it be reasonable to add 1,200 miles of new route to any system by compulsion?

S. M., page 43, paragraph 2:

Now, it seems to me it is quite apparent that the Florida-Canal Zone route is, in effect, a new route, and a very substantial route.

S. M., page 62, paragraph 8, through page 68, line 1:

Mr. CAHILL: May it please the Board, in opening the argument on behalf of W. R. Grace & Co., I should like to refer to certain of the basic facts in regard to Panagra.

Panagra presently holds a certificate of public convenience and necessity for the carriage of persons, property, and mail between Balboa in the Canal Zone and Buenos Aires, via the West Coast of South America. Its present route mileage is approximately 8,800 miles.

The instant proceeding involves an extension of approximately 1,150 route miles. That is less than 1/7 of the existing route mileage.

Now, turning for just a moment to the growth of Panagra, the following few figures indicate the extent of Panagra's growth during the 10-year period from 1933 through 1942.

Panagra's route mileage has practically doubled. Its airplane mileage has quadrupled. Its passenger mileage has increased 10-fold. Its frequency has increased from twice a week to 7 times a week, plus additional trips. Its commercial revenue has increased more than 10 times and its investment in aircraft and ground facilities has increased four times.

In addition Panagra's passenger revenue has increased more than 10 times. Its express and freight revenues have increased almost 30 times.

Since the year 1942 Panagra's growth and development has continued at even a greater pace. Just taking a few of the statistics of Panagra, comparing 1943 with 1942, its plane miles in 1943 were 4,700,000, an increase of practically 700,000 over 1942; its passenger miles in 1943, 57½ million miles, an increase of 13½ million over the year before. Passengers carried in '43, 69,000, an increase of 13,000 within the year.

Pounds of express in 1943, 2,000,000, an increase of 607,000 pounds within the year. In mail, 280,000 pounds in 43, an increase of practically 40,000 pounds, and in personnel 2,500 employees in 1943; 1,600 employees in 1942.

From those few statistics, cold though they are, the Board will see that Panagra's development over the past decade has continued apace, and that this proposed extension would not

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be a sudden and staggering expansion to a carrier which has maintained a static position over a period of years. It would be on the contrary but the natural growth of Panagra, which has grown, as I have said, apace over the years.

Now, taking again just a few figures on the financial aspects of this proposed extension: the total investment for equipment, assuming DC–4 operation, is only $835,000. Most of this will be for flight equipment, which Panagra would be able to use anywhere.

Now, that figure of $835,000 is insignificant when we consider these few figures: Panagra, as of 1942, had cash and Government bonds of over two and a half million dollars, total gross assets of $10,750,000, net worth, exclusive of good will, of practically four million dollars. This capital expenditure of $835,000 is less than half the estimated operating revenue of the extension for one year, without United States mail pay, and it is less than four times the estimated annual return on DC–4 operation. Hence the total capital investment about which we are talking will be made up in less than four years.

The estimated annual expenses on this DC–4 operation would be approximately a million six hundred thousand dollars. There would, therefore, be an estimated annual return of approximately a quarter of a million dollars before United States mail pay.

Now, I should like to take up, from the factual aspect, those features of the proposed extension which I think show clearly its character as not being a new route. Under the proposed permanent operation of this extension, with four-engined equipment, the flights will be made nonstop between the Canal Zone and the United States, thus the bringing of this American Flag carrier to its home country will add only one stop to a carrier that now has 35 stops on its route, and even with temporary DC–3 operation, this extension would add only one additional refuelling stop.

Now, the mileage here is not a significant factor. When counsel attempts to compare it with the route of Eastern or the route of United on the West Coast, counsel leaves out of account the fact that this route is almost entirely over water. The flight is much simpler from technical and operation points

of view than many other Panagra operations, and the purpose of this proposed extension is to more adequately serve the existing traffic on the present Panagra line. It is undisputed here that in the period 1938 through 1942 over 75 percent of Panagra's passengers carried south from the Canal Zone were received from Pan American at the Canal, and in the same period approximately the same percentage brought to the Canal northbound were transferred to Pan American's various divisions for carriage to the United States.

Now, there is an interesting parallel in a previous proceeding before this Board, and I refer to the New Orleans route case. There Pan American sought an amendment. It wanted to extend its route from Guatemala City to New Orleans and to provide a route between New Orleans and Balboa via Havana.

Now, at that time and under those circumstances, this is how Pan American described its application, and I quote a sentence: "The application of Pan American proposes not the inauguration of a new route in the usual sense but rather an extension and improvement of the existing service or that carrier," and continuing, the brief says, and I quote: "It will be seen that about half of the route distance involved in the proposed New Orleans-Central America-Canal Zone operation is already a part of the operations of Pan American, and that every terminal and intermediate point on the route involved in this proceeding, except only the City of New Orleans itself, is now served by that carrier.

"The purpose of the present application is, therefore, not to inaugurate a new route in the usual sense, but by opening the New Orleans Gateway to improve Pan American's existing service to Central America and the Canal Zone," and counsel in his oral argument in that case, on behalf of Pan American, referred to the service proposed, and I quote: "as a rather modest change in the air transport map."

For Panagra here, carrying through the analogy, the granting of a Florida terminal will amount to no more than an extension and an improvement of its existing service, and to paraphrase the Pan American position, that this proposed service will not involve the granting of a new route but the opening of a terminal or gateway.

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Now, treating of the alleged unwillingness of Panagra from the factual side, that is one of the fundamental grounds of the Pan American motion to dismiss. Panagra is not unwilling in the sense that it is resisting this proposed amendment. W. R. Grace & Co. owns 50 percent of the stock of Panagra, and directors representing W. R. Grace & Co.'s stock interest have urged for years, that Panagra be permitted to apply for a United States terminal.

Now, it is true the members of the Panagra management were not allowed upon this trial to testify in their official capacity, but they were permitted to testify in their individual capacity, and they testified, to a man, in favor of the proposed extension.

Now, Panagra, let the fact be clear, has made no application for a United States terminal, solely because its other 50-percent stockholder, Pan American Airways, has consistently refused to permit such application. Pan American, the record here discloses, even went to the extent of instructing its representatives on the Panagra Board not to attend Panagra directors' meetings. Pan American itself called a Panagra stockholders meeting to consider an application for a United States terminal, and it stayed away from that, too.

Now, the reason, among others, for Pan American's refusal to permit the second largest American-flag carrier abroad to come to the United States is that the extension would not be in the best interests of Pan American. Pan American is here trying to take advantage of a situation created by its own hostility to Panagra's interests.

S. M., page 84, paragraph 3, through page 85, paragraph 1:

Now, the best answer as to how far the Board may go, I think, is found in the Board's own decisions, of which I will make mention only of three. The first of these has to do with the extension of the route of Continental Air Lines beyond Wichita, its original terminal, to Tulsa. The mileage of this end-on extension was one-third of Continental's existing route mileage.

The second of these three had to do with a change of Pan American's route from New York to Lisbon, so as to double its previous route mileage.

The third and last is again Pan American, an extension of Pan American's route from Manila to Singapore, of almost 1,500 miles.

Now, both on the absolute and on the relative side, the extension in this case is smaller than others previously granted by the Board, and it is no answer to those cases to say that they involve voluntary extensions, because no distinction is drawn in 401 (h) between the Board's power to amend in a voluntary and the Board's power to amend in a compulsory extension. The power to amend is the same, regardless of how it is invoked by the petition of the carrier, on complaint to the Board, or on the Board's own motion.

The only restriction is to be found in the standard of the public interest, and in the restriction contained in the Constitution, which we have summarized in the words that it must be a reasonable extension.

S. M., page 92, paragraph 1, sentence 2:

It is elementary that no one can attack the constitutionality of a statute or of a regulation which does not inflict injury upon him.

S. M., page 93, paragraph 5:

Now, there is no reason in principle why a common carrier should not be compelled to render more adequate service to its existing traffic, and here the traffic is 75 percent, even though it is thereby required to step outside the confines of its previous territory.

S. M., page 95, first two sentences:

All of those regulations involve concepts more drastic than the one we are here considering. Here the carrier is merely required to render more adequate service to its existing traffic by extending its route, and there is every reason to believe that the extension will prove to be a profitable one.

ARGUMENT BY MR. WANNER, PUBLIC COUNSEL

S. M., page 137, paragraph 5, through page 138:

Mr. WARNER: Mr. Wanner, the subject of jurisdiction has so far been argued in very broad terms with little reference to the fact of this particular case. I wondered whether you felt

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that there was anything in the facts of this case that set it aside jurisdictionally from what might be a more typical instance, the more typical instance perhaps being that a more active unwillingness as compared with a perhaps passive unwillingness that results in this case from an internal deadlock?

Mr. WANNER: As I have stated, I am not particularly prepared to talk on that, for the reason that it involves an examination of the entire transcript, and there are many implications to be drawn from the transcript and from the record. However, it seems to me that the case—I mean obviously from general knowledge of the record, having assisted in the trial of it, I know that it is different from perhaps the ordinary case of compulsory extension that would arise. For instnce, it would be different from the attempt to extend northwest from Chicago to New York because the class of traffic carried here between the United States and the West Coast of South America is so predominantly United States traffic, the carrier was formed for the carriage of mail from the United States to those points by means of its very close affiliate, Pan American Airways.

The charters of Panagra obtained from some of the South American countries referred to service between the United States and the West Coast of South America, and all the scheduling and even the advertising in this country and in South America, all the facts in the case show that it is considerably different from the usual case in which you might take one carrier and try to extend him into a territory which he had to some extent incidentally been drawing from.

Mr. WARNER: The facts you mention are facts of the route rather than the internal constitution of the carrier. I take it that your answer to my question would be that you do not feel that the jurisdictional issue is affected by the peculiar division of ownership and the relation between owners?

Mr. WANNER: Not particularly. The fact that Panagra is nonwilling, is to me just the same as though it were definitely unwilling. That is, the fact is that it is not willing in this case although it happens to be a 50–50 proportion.

REBUTTAL ARGUMENT BY MR. HARLAN (EASTERN)

S. M., page 150, paragraph 2, to page 151, paragraph 2:

Mr. HARLAN: Now another point, which has been made is that the ordinary dictionary definition of the word "amend" is adequate to cover the proposed new service here under consideration. Now, I submit—Mr. Cahill, I believe, said that no one disputed that. I submit that there is a dispute on that and if Mr. Cahill will read our brief on pages 17 and 20, he will discover that there is a dispute. We have taken the same definition which the others have used here to the effect that an amendment is a change which does not change the identity or the character of the thing which has been changed. Now, I submit that the ordinary man in the street would not agree offhand that a 12000 mile new route between the Canal Zone and the United States is a mere amendment of Panagra's existing route. I think that Grace itself has taken the position that that is substantially more than an amendment.

On page 18 of our brief, we have quoted from Grace's petition which was the occasion for the inauguration of this proceeding, in which Grace said that the new route between the Canal Zone and the United States "would give the Panagra route the standing of an independent American international air line with a terminal in the United States," and I submit that is a statement on the part of Grace to the effect that the character of Panagra would be changed by reason of this proposed extension and I don't believe that Grace can take the position that this is a mere extension and improvement of its existing service, and then turn around on the other hand and argue that this change is necessary in order to give Panagra an independent status which it does not now have, because I believe that does change decidedly the character and identity of Panagra, at least under the allegations made by Grace.

REBUTTAL ARGUMENT BY MR. FRIENDLY (PAN AMERICAN)

S. M., page 164, last line, to page 166, paragraph 1:

Mr. FRIENDLY: There has been talk about 8,800 miles of route of Pan American-Grace in South America which is true enough if you understand that it includes all the paralleling

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mileage, for example, the sawtooth across Bolivia is counted twice, and that actually the distance between the termini is 3,844 miles.

The company has grown but it is not unique in that.

Then, various reasons are marshaled why it is not a new route. A certain deep significance appears to be given to the fact that it is over water. Well, I wonder whether Los Angeles-Honolulu is not a new route for TWA. There not only is there no stop, but there is no place where you could stop, and yet it seems to me that that is a new route on any ordinary meaning of the words. It is about twice as long as this, but I can't imagine that is the test. If 1,200 miles is not a new route, then, why not 2,400 miles? Then, the purpose is said to be more adequately to serve the existing traffic, and it is said that over 75 percent of Panagra's passengers carried south from the Canal were received from Pan American. That again is approximately a true statement if you listen to it closely, but in listening to it, you have to bear down on that word "from." "Carried south from the Canal," not "carried south of the Canal," because you see, actually the through passengers carried from the Canal have always been a comparatively small part of Pan American-Grace's passengers. Then, something is said about the New Orleans case. I have already pointed out that that was not a 401 (h) application, and as to what I said as to that not being an ordinary new route, I think there is the obvious distinction that Pan American had been engaged in serving the trade between the United States and the Canal Zone for 14 years out of these other gateways to the east and west, whereas that is a trade which Pan American-Grace has never served.

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Correspondence between the Civil Aeronautics Board and Parties.

Letter of Chief Examiner Leasure.

(R.* 8846-D, E)

CIVIL AERONAUTICS BOARD

WASHINGTON

(SEAL)

December 17, 1943

Mr. H. Preston Morris
58th Floor
135 E. 42nd Street
New York, N. Y.

Mr. William F. Cogswell
7 Hanover Square
New York, N. Y.

Mr. John T. Cahill
63 Wall Street
New York, N. Y.

Mr. H. N. Deyo
64 Water Street
New York, N. Y.

Mr. Henry J. Friendly
31 Nassau Street
New York, N. Y.

Mr. E. Smythe Gambrell
Citizens & Southern Nat'l
Bank Bldg.
Atlanta, Ga.

Mr. William I. Denning
Investment Building
Washington, D. C.

Mr. Edward Bierma
15 Broad Street
New York, N. Y.

Mr. H. R. Bolander, Jr.
Chicago and Southern Air Lines
Municipal Airport
Memphis, Tenn.

Mr. A. C. Wiprud
2736 Dept. of Justice
Washington, D. C.

Re: Docket No. 779.

Gentlemen:

As you have been advised, the Board has determined to hear oral argument on the motion of Pan American Airways Corporation to dismiss the proceeding in Docket No. 779, known as the Panagra Terminal Investigation, for want of jurisdiction. On December 3, 1943, W. R. Grace & Company

* "R." refers to the pages of the record filed with this Court as renumbered by the Civil Aeronautics Board.

filed a "cross motion" urging the Board to "defer oral argument on and consideration of the motion of Pan American Airways Corporation to dismiss this proceeding for want of jurisdiction until final argument upon the merits, subsequent to the filing of the Examiner's report". This motion was denied by the Board's order of December 17, 1943.

The oral argument has been assigned for January 31, 1944, in the officers of the Board at 10 a. m. The time and order of presentation of arguments have been assigned as follows: Pan American, 1 hour; Eastern Air Lines, 30 minutes; National Airlines, 10 minutes; Chicago and Southern Air Lines, 10 minutes; W. R. Grace & Company, 1 hour; and Public Counsel, 1 hour. Counsel for Pan American may reserve a portion of his time for rebuttal.

At the suggestion of counsel, the Board will receive briefs on this question in order to facilitate a presentation of authorities and such detailed facts as may be necessary and in order to restrict the time required for the oral presentation. These briefs will be due January 15, 1944, and should not exceed 50 pages.

Very truly yours,

(sgd) C. EDWARD LEASURE

C. EDWARD LEASURE
Chief Examiner

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Correspondence between the Board and Parties.

Letter of Wright, Gordon, Zachry, Parlin & Cahill to Civil Aeronautics Board, January 4, 1944.

(R. 8846-J, K.)

Letterhead of
WRIGHT, GORDON, ZACHRY, PARLIN & CAHILL
Sixty-three Wall Street
New York

January 4, 1944

Re: Panagra Route Extension Docket No. 779.

Dear Sirs:

We are in receipt of a copy of a letter of Mr. Gambrell, counsel for Eastern Airlines, dated December 27, 1943.

Mr. Gambrell lists five points which he intends to brief and argue in support of Eastern's motion to dismiss this proceeding.

Points 1 and 5 raised by Mr. Gambrell obviously do not raise any question of the Board's jurisdiction, but involve only the issue as to whether the Board, granting that it has jurisdiction, should amend Panagra's certificate so as to provide for the extension of the route. Inasmuch as the Board has denied the cross motion of W. R. Grace & Co. to join the argument on the jurisdiction question with the argument on the merits, we believe it is clear that agument on Points 1 and 5 listed by Mr. Gambrell have no proper place in the argument now scheduled by the Board.

Point 4 raised by Mr. Gambrell relates solely to the application of Section 408 of the Civil Aeronautics Act in this proceeding. While this does raise in part a question of law, it is an entirely different question from the question as to whether the Board has jurisdiction to order the route extension. Inasmuch as we have not been advised by the Board that the issue of the application of Section 408 is to

be considered at this time, we assume that this issue is likewise not properly brought before the Board on this pending argument.

Point 2 involves no question of jurisdiction of the Board, but solely a matter of its discretion, which the Board has, we believe, already conclusively determined.

This leaves only the third point raised in the letter. Even this fails to correctly state the issue now to be argued before the Board. The question is not whether the Board lacks power to grant a new route to Panagra for which it has not applied, but rather whether the Board has the power to amend Panagra's certificate so as to provide for the extension of its route from the Canal Zone to a terminal in Florida.

We believe it to be in the interests of proper and expeditious procedure that the issue before the Board on the argument now set for January 31, 1944 be so defined that irrelevant and extraneous considerations such as those raised in Mr. Gambrell's letter will not be brought into the argument and the briefs. This should be done well in advance of the time set for the filing of briefs.

Respectfully yours,

WRIGHT, GORDON, ZACHRY, PARLIN & CAHILL,
Attorneys for W. R. Grace & Co.

Civil Aeronautics Board
Commerce Building
Washington 25, D. C.
[CC to all parties]

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Excerpts from Brief of Pan American Before the Civil Aeronautics Board On Motion to Dismiss, Dated January 14, 1944.

Page 2, Line 16 to Page 4, Line 14, Inclusive (R. 8679-81):

The facts necessary to decision of this motion are as follows:

Under date of August 31, 1928, Pan American Airways Corporation and W. R. Grace & Co. (hereinafter referred to as "Grace") entered into an arrangement (Exhibit P-34, p. 46) "under which we will associate for the commencement of an airplane service in Peru with the view of ultimately inaugurating a through mail service from the Panama Canal to Valparaiso, Chile." A corporation, with a capital stock of $50,000, to be owned equally by each of the two companies, was to be formed for the purpose of engaging in operations in Peru under the concession theretofore acquired by Huff-Daland Dusters, Inc. on which Pan American had an option (Exhibits P-34, pp. 2-19, P-211). If Pan American determined that it was "advisable to bid on a contract for carrying the mails between the Panama Canal and Valparaiso," Grace was to "have a reasonable time after a study of the estimated costs of such operation to determine what interest, if any, we will take in the company making the bid in addition to our initial investment of $25,000, such interest not to exceed, however, more than 50% of the total capitalization."

Pursuant to this understanding Pan American-Grace was organized under the laws of Delaware early in 1929. It became the successful bidder on Foreign Air Mail Contract No. 9 (Exhibit P-34, pp. 66-72). This contract provided for air mail service from the Canal Zone to Santiago, Chile, with a right in the Postmaster General to require extension of the service to Buenos Aires, Argentina and Montevideo, Uruguay. Operations under this contract were begun in May, 1929, and continued until—and after—enactment of the Civil Aeronautics Act.

Excerpts from Pan American's Brief Before Board on Motion to Dismiss.

On the basis of this operation Pan American-Grace was awarded a certificate of public convenience and necessity under the "Grandfather Clause" of the Act for service between the Canal Zone and various points in western Colombia, Ecuador, Peru, Chile, Bolivia and Argentina (Order Serial No. 589, dated July 22, 1940). This certificate has since been amended on the application of Pan American-Grace by orders bearing serial numbers 736, 1075 and 1789, so as to include other operations within the general territory already served.

Pan American-Grace has never operated north of the Canal Zone and its entire history has been that of an air carrier in South America. The airport to airport distance between its northern and southern termini by the shortest route now flown is 3834 miles (C. A. B. opinion, July 30, 1942, Docket No. 716, Appendix S). Total route mileage (including a considerable amount of paralleling mileage) is approximately 8800 miles (Tr. 437, 796).

As stated above, Pan American-Grace has not applied for authorization to operate north of the Canal Zone. Pan American Airways Corporation and Grace, each of which owns 50% of the stock of the Company and is represented by an equal number of directors, entertain opposing views as to the making of any such application, this difference of opinion relating, among other things, to the question of the purpose for which Pan American-Grace was formed. The directors representing Pan American Airways Corporation, on instructions from that corporation, abstained from attending meetings at which it was known that the Grace directors would move that Pan American-Grace apply for an extension of its route from the Canal to the United States, on the ground that the matter was covered by agreements between the two stockholders which could not be altered without their assent (Exs. P-35, pp. 28, 30; PG II-12). At a meeting held on September 22, 1942, which was at-

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tended by all of the directors, a resolution proposing that Pan American Grace apply for such an extension was moved by one of the Grace directors but failed of passage (see minutes of this meeting submitted confidentially by counsel for Pan American-Grace).

Page 14, Line 34 to Page 15, Line 9, Inclusive (R. 8691-92):

An operation between the Canal Zone and the Florida peninsula, a distance of nearly 1,250 miles to Miami and over 1,400 miles to Tampa, a route as long as the entire operation of a number of the domestic carriers, is definitely a "new route", which "the Act does not now give to the Board power to initiate . . . where applications therefor are not first filed by private individuals or companies." The "amendment" provisions of Section 401(h) are wholly inadequate to authorize an order compelling such an operation—particularly so in the light of the fact that when Congress passed the Civil Aeronautics Act, it had before it the Supreme Court's decision in the *Oregon-Washington* case limiting the far more definite language of the Interstate Commerce Act.

One cannot improve on the Board's statement: "The word 'amendment' is vague and carries with it a limited concept." So great a power as that here in question cannot be rested on such a flimsy foundation.

Excerpts from Brief of W. R. Grace & Co. Before Civil Aeronautics Board in Opposition to Motion to Dismiss, Dated January 15, 1944.

Last Three Paragraphs on Page 3 (R. 8588):

I. The Board's power under Section 401 (h) to amend a certificate on its own initiative includes the power to provide for an extension such as is involved here. This conclusion follows both from an analysis of the language of the section and from its legislative history, as well as from the Act as a whole.

II. Pan American is not in a position to raise constitutional objections. In any event, on the facts presented here, an amendment requiring Panagra to operate to a Florida terminal is reasonable and, therefore, would not result in a deprivation of property without due process of law.

The issues here cannot be decided on the basis of pure legal argument *in vacuo*. Questions of fact concerning the proposed extension are involved. In this proceeding, therefore, reference to the record made at the hearings before the Trial Examiners is not only proper, but necessary. Facts relating to the proposed extension are summarized *infra*, pages 34-39.

Page 4, Lines 17 to 27, Inclusive (R. 8589):

It should be stated at the outset that there is no contention here that the Board's power under this provision to compel operation of route extensions is unlimited, or that it may be exercised in arbitrary disregard of constitutional limitations. But where, as in the present case, the proposed extension is clearly an amendment of Panagra's certificate within the common sense signification of that term, and is moreover a reasonable amendment required by the public convenience and necessity, an exercise of the Board's power of compulsion is plainly within the authority granted to it by the Act.

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Excerpts from Grace's Brief Before Board on Motion to Dismiss.

Page 9, Line 17 to Page 10, Line 14, Inclusive (R. 8594-95):

The extension involved here is not of such nature as to work an "utter transformation" of the character of the present route. The total route mileage involved—1150—is considerably less than was involved, for example, in the *Pan American, Singapore* case, *supra*, page 7. This mileage is less than 1/7 of Panagra's present route mileage and consequently less relatively than the amendment allowed in the *Braniff Airways, Kansas City—New Orleans* case, *supra*, page 6.

Most of the additional mileage is over water. Under the proposed permanent operation with four engined equipment, flights will be made non-stop between the Canal Zone and the United States. Thus, the United States terminal would add only one stop to the Panagra route which now includes 35 stops. Even the temporary DC-3 operation would add only one refueling stop in addition to the United States terminal.

The character of the operation on the proposed route is of considerably greater importance than the mileage. Balboa to Florida is a routine flight operation. Panagra's extension across Bolivia, while shorter, was a much more difficult operation, both from the standpoint of establishing airports in the interior, and of establishing a local cabotaje operation to serve a considerable number of way stations.

In the period 1938-1942 over 75% of the passengers carried by Panagra out of the Canal Zone were received from Pan American's connecting lines (Ex. P. G. 1, Item 1). Conversely, over 75% of the passengers brought to the Canal Zone by Panagra were turned over to Pan American's Eastern and Western Divisions to continue their journey (Ex. P. G. 1, Item 3).

Page 27, Lines 23 to 29, Inclusive (R. 8612):

Even if Pan American could oppose the amendment on constitutional grounds, its contentions are without merit.

Excerpts from Grace's Brief Before Board on Motion to Dismiss.

As in other situations where an action of an administrative agency is attacked as depriving a person of property without due process of law, the reasonableness of the amendment proposed in this proceeding is the criterion by which its constitutional validity must be tested.

Page 32, Lines 15 to 19, Inclusive (R. 8617):

To elevate, as does Pan American, the "undertaking to serve" fiction to the dignity of an inflexible rule of constitutional law is wholly at variance with the established principle that reasonableness under all the facts and circumstances is the test of the validity of governmental action.

Pages 34 to 39, Inclusive (R. 8619-24):

D. THE AMENDMENT PROPOSED IN THIS CASE IS REASONABLE

The following facts, taken from the Record in Docket 779 amply demonstrate the reasonableness of an exercise by the Board of its power to "require" Panagra to come through to a Florida terminal.

1. Panagra's Existing Service.

Panagra's growth and expansion over the ten-year period 1933 to 1942 effectively demonstrate not only that it is able to undertake additional service without difficulty, but also that the proposed extension is merely a further development in Panagra's natural growth. The following is a brief summary of this development (795-9; Ex. PG-4, Item 5):

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Excerpts from Grace's Brief Before Board on Motion to Dismiss.

	1933	1942
Route Miles	4551.5	8551.2
Airplane Miles	1,162,394	4,033,194
Passenger Miles	4,508,720	43,528,646
Frequencies	Twice weekly	Daily (plus additional trips)
Commercial Revenue	$426,000	$4,788,000
Investment in Aircraft & Ground Facilities	$955,000	$3,791,000

During this period, the following additional increases are reflected:

Average ton miles	355%
Used ton miles	680%
Passenger revenue	1,046%
Express & freight revenue	3,160%

2. Pan American's Traffic on the Miami-Canal Zone Route.

The proposed service is on a route on which there already is extremely heavy traffic, with unlimited possibilities of further development. This is apparent from the following statistics on the volume of passenger traffic, mail and express on the Miami-Canal Zone route as operated by Pan American during the years 1940-42 (Exs. P-2; P-14):

Southbound

Year	Total Passengers Carried	Pounds of Mail	Pounds of Express
1940	1241	87,966	197,522
1941	2273	135,764	206,308
1942	6053	422,809	785,691

Excerpts from Grace's Brief Before Board on Motion to Dismiss.

Northbound

1940.....	1368	64,907	41,435
1941.....	2315	116,258	43,106
1942.....	7062	335,370	79,611

3. Extent of Proposed Service.

The proposed service is not over a new and uncharted course where unknown navigational, meteorological and other problems might be encountered. It is, as has previously been mentioned, but one stop beyond Panagra's present terminal, involving largely an over-water operation.

The additional mileage represents an increase, on a through operation* between Florida and the Canal Zone, of 1,150 miles (Ex. PG-4, Item 30, p. 12).** This is by no means a formidable addition for a carrier whose route miles have increased from 4,463 in 1929 to over 8,800 in 1943. As previous illustrated, *supra* pp. 9-10, the character of the proposed operation and not solely the mileage involved is important.

The exhibits are based upon a proposed daily service, which is the same frequency as Panagra now operates on its international trunk route.

4. Expenditure Required.

With respect to the expense attendant upon the projected service, the exhibits show (Ex. PG-4, Item 30, pp. 12-13 and Item 34) that the total investment for equipment will amount to $835,000. In connection with this estimated expense, the following facts are significant to note:

(1) The estimates given are of course based upon the high price level prevailing in 1943.

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* This refers to a non-stop operation between Florida and the Canal Zone with DC-4s or other available equipment of that type. DC-4 statistics were used in the exhibits. Ex. PG-4, Item 34, page 3 states, however, that "whatever modern and suitable type of four-motored flying equipment might be available for this operation should be used. It is believed that the corresponding operating figures would be no less favorable than those submitted herein."

** Unless otherwise indicated, all statistics given relate to a terminal at Miami, Florida. Corresponding figures for Tampa will be found in the exhibits.

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(2) Some of the estimated capital expenditures (e.g., for communications equipment) might be reduced by joint facilities arrangements. (452)

(3) The relatively small amount involved is attributable to the fact that there will be fewer stations per route mile on the proposed extension than on the present operations, namely, only one in Florida, and one in Kingston (on the DC-3 operation only), with some possible additional expenditures at Balboa (1461).

5. Financial Condition of Panagra.

Panagra is in a strong position to undertake this estimated expenditure. Comparing the financial record of Panagra with any commercial airline in the United States, it is such, in the opinion of the President of the Company, that "there is not any airline that can match it" (798).

As of the end of 1942 the company had cash and Government bonds of $2,592,000, total gross assets of $10,754,000 and a net worth, exclusive of good will of $3,900,000. During the ten-year period 1933 to 1942 the company capitalized the sum of $2,850,000 and built up a miscellaneous reserve of $399,000 and a self-insurance reserve of $1,201,000 (796-8; cf. Exs. G-22, G-23).

The relatively small amount of the capital expenditure required for the permanent operation between Florida and the Canal ($835,000) is apparent when compared with these figures. Moreover, it is less than half the estimated operating revenue for one year.

6. Estimated Revenue, Expenses and Return Expected.

The secure position of the company from a financial standpoint and the estimate of expected revenue from the proposed operation, demonstrate the absurdity of any argument that an order requiring the extension would be a deprivation of property in violation of the due process clause.

Excerpts from Grace's Brief Before Board on Motion to Dismiss.

The estimates of Panagra's Vice-President and Comptroller envisage an annual revenue of $1,929,500 on the basis of daily service with DC-4s between Miami and Balboa. The estimated annual operating expenses are $1,686,700.

This results in an estimated operating profit, before United States mail but including revenue for the carriage of foreign mail northbound, in the amount of $242,800* (PG-4, Item 34, p. 3). Of course, the rates which Panagra would receive for carrying southbound mail (including any subsidy) will be determined by the Board. In accordance with established practice, however, such rates would be fixed at a point which would cover Federal taxes and a return on the investment, as well as any possible deficit from operations.

These estimates of revenue to be derived by Panagra on the suggested route are supported by conservative estimates of the passenger, mail and express traffic to be carried by Panagra (49-50; Ex. PG-4, Items 16 and 20).

As a result of the remarkable growth of Panagra during the past ten years or so, it is the opinion of the operations executives of Panagra that the Company is in a better position today than ever before to add more mileage, because it is starting from a higher basis and with a larger organization, with the result that the proposed service will cause no increase in the general and burden expenses of operations (453-4; 601-2).

7. Advantages to the Public.

Over 75% of Panagra's passengers carried south from the Canal Zone are received from Pan American at the Canal and approximately the same percentage of those brought to the Canal northbound are transferred to Pan American's respective divisions for carriage to destinations in the United States (Ex. PG-1, Items 1 and 3).

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* On the DC-3 operation from Miami, the estimated operating profit is $37,100. If the operation were from Tampa, instead of Miami, there would be an operating deficit of $10,200 (DC-4 operation) and $181,300 (temporary DC-3 operation).

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Excerpts from Grace's Brief Before Board on Motion to Dismiss.

Numerous advantages will accrue to these passengers from an extension of Panagra's route to a Florida terminal.

The advantage of the speedier service on the DC-4 operation which would carry through passengers to Lima from Miami in seventeen hours is, of course, obvious. Under the proposed schedule, the Panagra plane would leave Miami at 00:00, arrive in Balboa at 7:15 and be in Lima at 17:05 (PG-4, Items 17-18).

The manifold advantages from the point of view of passenger comfort and convenience on a through service have been abundantly developed in the record. They include:

(a) Fundamentally, and without stating at length the serious inadequacies of Pan American's connecting service, it would relieve the traveling public of all the disadvantages that inhere in any connecting service and would facilitate and improve the services between the United States and the eight important South American countries on Panagra's route (e.g., a number of delays in arrival are inevitable, being caused by weather, motor trouble, and other factors). Such delays are an inherent defect of a connecting service. (223) Apart from the difficulties caused by Pan American's numerous delays (Exs. P-25, P-25A, P-25B), even Panagra delays are proof of the advantages of a Panagra direct through service. (792)

(b) It would eliminate passenger discomfort and inconvenience on a night flying operation. A connecting service would require passengers to arise some time before the arrival at Balboa, and transfer from one aircraft to another, instead of continuing the trip as on a through operation, either asleep or awake, as the passengers might choose. (175-6)

(c) Panagra rather than Pan American would control reservations on the Canal Zone-Florida sector, thus preventing international through passengers from being blocked out by local sector traffic. (804)

(d) The competition provided by the extension would result in improved service generally, as illustrated by the expedition of Pan American's passenger handling at Brownsville since the advent of the competition of American Airlines on the Mexico service. (400)

In addition to these advantages to the traveling public, there would be the following advantages to Panagra itself:

(a) A through service would make possible a *maintenance base* in the United States, nearer and more accessible to the source of supply of skilled labor and of materials and parts—providing an item of economy through the elimination of heavy inventory, rush shipments, etc. Further savings could be obtained on customs duties. It would enable the technical staff to be in closer contact with other experts in the U. S. on special problems that arise in the course of operations. (177-8)

(b) It would assist in the procurement of skilled pilots who would be attracted by the possibility of an occasional layover in the United States. (177-8)

(c) It would make for a more economical *utilization of equipment.* (356-7)

(d) It would result in a *generation of traffic* because of the elements of increased capacity and frequency and of competition. (440-1) The fact that transportation via Panagra could be sold on a through basis would also be helpful in the generation of traffic. (399-400)

(e) It would facilitate *freight service.* The fewer transfers of freight, the more efficient and less expensive the service becomes. Every time cargo has to be handled the package problem becomes serious and the expeditious character of the service is retarded. (806)

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Excerpts from Oral Argument Before the Civil Aeronautics Board on Motion to Dismiss.

Argument of Mr. Friendly

(Pan American)

S. M.* 16, Line 8, to S. M. 17, Line 8, Inclusive (R. 8423-24):

When I read the Board's annual report for 1942, it seemed to me that the Board fully appreciated these considerations and construed the statute as I have suggested this morning it should be construed, and as I believe it generally has been construed by the industry.

Rereading that report, as I have done many times since this issue arose, I still cannot interpret it in any other way. Counsel for Grace & Co. say that what the Board was really trying to tell Congress was that it had no power to compel the inauguration of a new route, although it did have power to require extension of an existing route, and says that, in even intimating the contrary, Pan American is guilty of a systematic attempt to confuse the issue.

Not wanting to be guilty of that, I read the report again and I think it takes a pretty close reading to find in it the distinction that is relied on. I am not sure that the distinction helps the argument, anyway. What is there to tell us that an operation of 1,200 miles between the continental United States and one of its overseas possessions is merely an extension, or, as was said during the hearings, a shuttle service, as distinguished from a new route. Eastern Airlines operation from New York to Miami, the United's from Seattle to San Diego have always been considered pretty important routes. They have been the envy of many in the business. The Canal Zone-Miami route is longer than any of those. In fact, it is longer than the entire operation of some of the other carriers and if that is not a new route, one may fairly ask what is.

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* S. M. refers to the stenographic minutes of the oral argument or of the hearings before the Examiners, as the case may be.

Excerpts from Oral Argument on Motion to Dismiss.

S. M. 164, Line 29, to S. M. 166, Line 14, Inclusive (R. 8571-73):

There has been talk about 8,800 miles of route of Pan American-Grace in South America which is true enough if you understand that it includes all the paralleling mileage, for example, the sawtooth across Bolivia is counted twice, and that actually the distance between the termini is 3,844 miles.

The company has grown but it is not unique in that.

Then, various reasons are marshalled why it is not a new route. A certain deep significance appears to be given to the fact that it is over water. Well, I wonder whether Los Angeles-Honolulu is not a new route for TWA. There not only is there no stop but there is no place where you could stop, and yet it seems to me that that is a new route on any ordinary meaning of the words. It is about twice as long as this, but I can't imagine that is the test. If 1,200 miles is not a new route, then, why not 2,400 miles? Then, the purpose is said to be more adequately to serve the existing traffic, and it is said that over 75 percent of Panagra's passengers carried south from the Canal were received from Pan American. That again is approximately a true statement if you listen to it closely, but in listening to it, you have to bear down on that word "from." "Carried south from the Canal," not "carried south of the Canal," because you see, actually the through passengers carried from the Canal have always been a comparatively small part of Pan American-Grace's passengers. Then, something is said about the New Orleans case. I have already pointed out that that was not a 401(h) application, and as to what I said as to that not being an ordinary new route, I think there is the obvious distinction that Pan American had been engaged in serving the trade between the United States and the Canal Zone for 14 years out of these other gateways

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to the east and west, whereas that is a trade which Pan American-Grace has never served.

ARGUMENT OF MR. CAHILL

(Grace)

S. M. 62, Line 20, to S. M. 66, Line 29, Inclusive (R. 8469-73):

Mr. Cahill: May it please the Board, in opening the argument on behalf of W. R. Grace & Co., I should like to refer to certain of the basic facts in regard to Panagra.

Panagra presently holds a certificate of public convenience and necessity for the carriage of persons, property, and mail between Balboa in the Canal Zone and Buenos Aires, via the West Coast of South America. Its present route mileage is approximately 8,800 miles.

The instant proceeding involves an extension of approximately 1,150 route miles. That is less than 1/7 of the existing route mileage.

Now, turning for just a moment to the growth of Panagra, the following few figures indicate the extent of Panagra's growth during the 10-year period from 1933 through 1942.

Panagra's route mileage has practically doubled. Its airplane mileage has quadrupled. Its passenger mileage has increased 10-fold. Its frequency has increased from twice a week to 7 times a week, plus additional trips. Its commercial revenue has increassed more than 10 times and its investment in aircraft and ground facilities has increased four times.

In addition Panagra's passenger revenue has increased more than 10 times. Its express and freight revenues have increased almost 30 times.

Since the year 1942 Panagra's growth and development has continued at even a greater pace. Just taking a few of the statistics of Panagra, comparing 1943 with 1942,

its plane miles in 1943 were 4,700,000, an increase of practically 700,000 over 1942; its passenger miles in 1943, 57½ million miles, an increase of 13½ million over the year before. Passengers carried in '43, 69,000, an increase of 13,000 within the year.

Pounds of express in 1943, 2,000,000, an increase of 607,000 pounds within the year. In mail, 280,000 pounds in '43, an increase of practically 40,000 pounds, and in personnel 2,500 employees in 1943; 1,600 employees in 1942.

From those few statistics, cold though they are, the Board will see that Panagra's development over the past decade has continued apace, and that this proposed extension would not be a sudden and staggering expansion to a carrier which has maintained a static position over a period of years. It would be on the contrary but the natural growth of Panagra, which has grown, as I have said, apace over the years.

Now, taking again just a few figures on the financial aspects of this proposed extension: the total investment for equipment, assuming DC4 operation, is only $835,000. Most of this will be for flight equipment, which Panagra would be able to use anywhere.

Now, that figure of $835,000 is insignificant when we consider these few figures: Panagra, as of 1942, had cash and Government bonds of over two and a half million dollars, total gross assets of $10,750,000, net worth, exclusive of good will, of practically four million dollars. This capital expenditure of $835,000 is less than half the estimated operating revenue of the extension for one year, without United States mail pay, and it is less than four times the estimated annual return on DC4 operation. Hence the total capital investment about which we are talking will be made up in less than four years.

The estimated annual expenses on this DC4 operation would be approximately a million six hundred thousand dollars. There would, therefore, be an estimated annual

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return of approximately a quarter of a million dollars before United States mail pay.

Now, I should like to take up, from the factual aspect, those features of the proposed extension which I think show clearly its character as not being a new route. Under the proposed permanent operation of this extension, with four engined equipment, the flights will be made nonstop between the Canal Zone and the United States, thus the bringing of this American Flag carrier to its home country will add only one stop to a carrier that now has 35 stops on its route, and even with temporary DC3 operation, this extension would add only one additional refueling stop.

Now, the mileage here is not a significant factor. When counsel attempts to compare it with the route of Eastern or the route of United on the West Coast, counsel leaves out of account the fact that this route is almost entirely over water. The flight is much simpler from technical and operation points of view than many other Panagra operations, and the purpose of this proposed extension is to more adequately serve the existing traffic on the present Panagra line. It is undisputed here that in the period 1938 through 1942 over 75 percent of Panagra's passengers carried south from the Canal Zone were received from Pan American at the Canal, and in the same period approximately the same percentage brought to the Canal northbound were transferred to Pan American's various divisions for carriage to the United States.

Now, there is an interesting parallel in a previous proceeding before this Board, and I refer to the New Orleans route case. There Pan American sought an amendment. It wanted to extend its route from Guatemala City to New Orleans and to provide a route between New Orleans and Balboa via Havana.

Now, at that time and under those circumstances, this is how Pan American described its application, and I quote a sentence: "The application of Pan American proposes not the inauguration of a new route in the usual sense but

rather an extension and improvement of the existing service of that carrier," and continuing, the brief says, and I quote: "It will be seen that about half of the route distance involved in the proposed New Orleans-Central America-Canal Zone operation is already a part of the operations of Pan American, and that every terminal and intermediate point on the route involved in this proceeding, except only the City of New Orleans itself, is now served by that carrier.

"The purpose of the present application is, therefore, not to inaugurate a new route in the usual sense, but by opening the New Orleans Gateway to improve Pan American's existing service to Central America and the Canal Zone," and counsel in his oral argument in that case, on behalf of Pan American, referred to the service proposed, and I quote: "as a rather modest change in the air transport map."

For Panagra here, carrying through the analogy, the granting of a Florida terminal will amount to no more than an extension and an improvement of its existing service, and to paraphrase the Pan American position, that this proposed service will not involve the granting of a new route but the opening of a terminal or gateway.

S. M. 101, Line 19, to S. M. 102, Line 15, Inclusive (R. 8508-09):

Mr. Ryan [Board Member]: Assuming that it exists and you give literal interpretation to the words "modify" and "amend" where would you stop? Does that power give the Board the right to require Panagra, for instance, to extend frequencies from Balboa to Moscow?

Mr. Cahill: I don't think you can take a hypothetical situation in vacuo and determine the application of 401(h) to them, because I think that 401(h) in applying what has now come to be known practically as the universal standard for the guidance of regulatory commissions, namely, the familiar touchstone of public convenience and necessity causes you to look elsewhere in the statute for the meaning

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of public interest, requires you to look elsewhere still for what you find. I cite, for example, the exhortation at the beginning of the Act, "to encourage American Aviation." I cite the application of the standards in the section of your Act that has to do with rate making elements, you see, against the record made in a particular application. The composite of those you apply in determining your statutory standard.

Now, your statutory standard of public interest, convenience and necessity will oftimes coincide with the interests protected by the fifth amendment of the Constitution of the United States, namely, the standard of reasonableness.

That is how I approach the problem.

ARGUMENT OF MR. HARLAN

(Eastern)

S. M. 150, Line 11, to S. M. 151, Line 15, Inclusive (R. 8557-58):

Now, another point which has been made is that the ordinary dictionary definition of the word "amend" is adequate to cover the proposed new service here under consideration. Now, I submit—Mr. Cahill, I believe, said that no one disputed that. I submit that there is a dispute on that and if Mr. Cahill will read our brief on pages 17 and 20, he will discover that there is a dispute. We have taken the same definition which the others have used here to the effect that an amendment is a change which does not change the identity or the character of the thing which has been changed. Now, I submit that the ordinary man in the street would not agree offhand that a 1200 mile new route between the Canal Zone and the United States is a mere amendment of Panagra's existing route. I think that Grace itself has taken the position that that is substantially more than an amendment.

Excerpts from Oral Argument on Motion to Dismiss,

On page 18 of our brief, we have quoted from Grace's petition which was the occasion for the inauguration of this proceeding, in which Grace said that the new route between the Canal Zone and the United States "would give the Panagra route the standing of an independent American International airline with a terminal in the United States," and I submit that is a statement on the part of Grace to the effect that the character of Panagra would be changed by reason of this proposed extension and I don't believe that Grace can take the position that this is a mere extension and improvement of its existing service, and then turn around on the other hand and argue that this change is necessary in order to give Panagra an independent status which it does not now have; because I believe that does change decidedly the character and identity of Panagra, at least under the allegations made by Grace.

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Memorandum of Pan American in Opposition to Petition of Grace for Reargument and Reconsideration.

(R. 8819-31).

BEFORE THE

CIVIL AERONAUTICS BOARD

IN THE MATTER *of* The alteration, amendment and modification of the certificate of public convenience and necessity of PAN AMERICAN-GRACE AIRWAYS, INC. under Section 401(h) of the Civil Aeronautics Act of 1938, as amended, to provide for a route terminal in the United States.	Docket No. 779.

MEMORANDUM ON BEHALF OF PAN AMERICAN AIRWAYS CORPORATION IN OPPOSITION TO PETITION OF W. R. GRACE & CO. FOR REARGUMENT AND RECONSIDERATION.

ROOT, CLARK, BUCKNER & BALLANTINE,
Attorneys for Pan American Airways Corporation.

HENRY J. FRIENDLY,
Of Counsel.

Memorandum of Pan American in Opposition to Petition of Grace for Reargument and Reconsideration.

BEFORE THE

CIVIL AERONAUTICS BOARD

IN THE MATTER *of* The alteration, amendment and modification of the certificate of public convenience and necessity of PAN AMERICAN-GRACE AIRWAYS, INC. under Section 401(h) of the Civil Aeronautics Act of 1938, as amended, to provide for a route terminal in the United States.	Docket No. 779.

MEMORANDUM ON BEHALF OF PAN AMERICAN AIRWAYS CORPORATION IN OPPOSITION TO PETITION OF W. R. GRACE & CO. FOR REARGUMENT AND RECONSIDERATION.

We have received a copy of the petition of W. R. Grace & Co. (hereinafter referred to as "Grace") dated June 22, 1944, for reargument and reconsideration of the Board's order of May 24, 1944, dismissing this proceeding. While we believe it has not been the general practice to reply to petitions for reargument or reconsideration, Grace's petition contains so many misleading statements that we deem it our duty to call these to the attention of the Board. The material contained in Points I and III of the petition would not constitute grounds for reargument or reconsideration in any event, and we shall therefore confine this memorandum to Point II of the petition, in which Grace advances the claim that the Board deprive Grace of a fair hearing on the issue involved in the Board's order.

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The Board's conclusion, to which Grace objects, was (Opinion, p. 11) "that the extension of Panagra's route from the Canal Zone to the United States would not be an alteration, amendment, or modification of its certificate within the meaning of Section 401(h) of the Act in the sense that the Board could compel such an extension in the absence of an application from Panagra."

The facts and the reasoning leading to this conclusion are set forth in the last two paragraphs on page 10 of the Board's opinion. No exception is, or could be, taken by Grace to the statement of facts in the first of these paragraphs, which, indeed, follows very largely Grace's own presentation.

In proceeding from this statement to its conclusion, while the Board mentions the conceded facts as to the mileage of the new service and the minimum additional investment required, the Board states (Opinion, pp. 10-11):

> "However, the principal consideration which influences us is the fact that to extend the Panagra system from the Canal Zone to a point in Florida would constitute a basic transformation of the character of the carrier. Panagra, now a connecting carrier as to through traffic between the United States and South America, would be made a carrier directly serving that traffic—and serving it moreover in competition with an affiliated company. There is a fundamental difference between the position of a carrier whose routes stop so far short of the continental United States as those of Panagra and which depends upon connecting carriers for access to traffic to and from that area, and a carrier which has direct access to the continental United States over its own system."

Grace does not, and cannot, claim any error of fact in this statement of the "principal consideration" leading

to the Board's conclusion. Instead, Grace seeks, by piling up misleading characterizations and partial quotations, to create the impression that Grace was somehow prevented from placing before the Board possible *countervailing* considerations, of a nature not clearly revealed. Analysis of this series of characterizations and quotations demonstrates the baselessness of this claim.

PAN AMERICAN'S ORIGINAL MOTION TO DISMISS (GRACE PETITION, PP. 8-9):

Pan American's original motion to dismiss dated September 14, 1943, did not raise a mere academic question of statutory construction, as Grace now seeks to maintain. It raised a question of the construction of Section 401 of the Civil Aeronautics Act *as applied to this particular case.* The motion was (pp. 1-2) "that the Board dismiss this proceeding on the ground that, for the reasons hereinafter set forth, the Board does not have the legal power to order Pan American-Grace Airways, Inc. to operate to a terminal in the United States, as proposed in the Board's order initiating this proceeding, and that the Board is without jurisdiction herein." The motion set forth the facts (p. 2) that Pan American-Grace Airways, Inc. was formed for the purpose of operating south of the Panama Canal, that Pan American-Grace had operated for many years south of the Canal and held a certificate for such operation, and (p. 3) that the proposal here in question was for an order "requiring a carrier to extend its operations over a new route 1,200 miles long, through an area which the carrier has never previously served." Referring to the Board's statement in its Third Annual Report that "the Act does not now give to the Board power to initiate the establishment of new routes for air transportation services where applications therefor are not first filed by individuals or companies," the motion alleged (p. 5) that "The impact of this pronouncement cannot be avoided by calling an operation of 1200 miles through the

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Caribbean between the Canal and the United States a mere 'extension' of an existing route in South America,"—almost the exact ground, as we see it, that was ultimately taken in the Board's opinion.

The relation of the particular "extension" here in controversy to Pan American-Grace's existing operations was thus invoked at the outset. However, even if the original motion to dismiss had been, not what it was, but what Grace alleges it to have been, this would still be utterly irrelevant, since this motion was denied by the Board's order of September 23, 1943.

When Pan American renewed its motion to dismiss at the close of the hearings, the motion again necessarily related to the action proposed to be taken *on the facts of this case,*—not in some other where the facts were different. To be sure, the motion related to the *power* of the Board and not to whether or not the power should be exercised. It seemed to Pan American, and it still seems, that, on any view, the range of facts necessary to be considered in determining the issue of the Board's *power* was much more limited than would be involved in an attempt to determine the *merits.* However, the record had been made, and if Grace's counsel conceived it to contain facts showing that the Board had power under the Act to order an "extension" of the size and character of that here involved, the record was there for such use as they desired to make of it. As will shortly appear, counsel in fact *did* make extensive use of this record to advance the very contentions which they now claim Grace was in some manner prevented from making.

ACTION OF BOARD ON GRACE'S CROSS-MOTION (GRACE PETITION, PP. 9-10):

In opposing Grace's cross-motion dated December 2, 1943 to defer consideration of the jurisdictional question and join the same with the merits, Pan American's position was not, as Grace seeks to maintain, that the question of

the Board's power to make the proposed order could be determined in a vacuum, without any regard to the facts, but rather that advance determination of the jurisdictional issue would avoid the necessity for elaborate briefing of many questions, some of which were irrelevant to such a determination on any view and others of which would require no such detailed discussion on the jurisdictional issue as they would upon the merits. The nature of Pan American's position becomes clear if the Board will read Pan American's letter of December 3, 1943 as a whole, rather than the single paragraph with one sentence omitted, which is quoted on page 10 of Grace's petition. In any event, whatever position was or was not taken by Pan American, the Board's refusal to postpone consideration of the jurisdictional issue to the merits did not mean at all and, as we shall show, was not understood by Grace's counsel to mean, that the record was not before the Board.

ACTION OF BOARD ON POINTS RAISED BY EASTERN AIR LINES (GRACE PETITION, PP. 10-11):

Grace's petition seeks to create the impression that Eastern sought to argue certain questions of fact relating to the Board's power to order the extension; that Pan American objected to Eastern's doing this; and, apparently, that as a result of this objection and the Board's ruling thereon, Grace was misled into failing to argue these facts. The record belies this claim.

In his letter dated December 27, 1943, counsel for Eastern Air Line gave notice of his intention to argue *five separate bases* for dismissal. Four of these would have been equally pertinent if Pan American-Grace had itself been applying for the Canal Zone-Miami route. Only one of them, the third, dealt with the power of the Board "to grant a new route to Panagra for which Panagra has not applied."

After a summary of this letter of Eastern's counsel which fails to convey any accurate impression of what Eastern's counsel was actually proposing, Grace quotes the

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third paragraph of our letter of January 3, 1944 objecting to "any such broadening of the argument to be heard at this time as is indicated in the letter of counsel for Eastern," and says "This again shows that the motion was intended to be confined solely to the general legal point." Grace carefully omits reference to the two paragraphs of our letter *preceding* that quoted, which demonstrate that Pan American's "objection" was not to the presentation of any arguments, factual or legal, relevant to the power of the Board to order the proposed Canal Zone-Miami operation without an application having been filed, but rather was to consideration of the four other grounds set forth in the letter of counsel for Eastern Air Lines which had nothing whatever to do with that issue.

Whatever may be thought of this wholly misleading summary of Eastern's letter and quotation from our answer, we must confess our amazement that, in discussing this episode, Grace should not have disclosed *that Grace's counsel also opposed consideration of the grounds urged by counsel for Eastern Air Lines on the same grounds which we had taken.* A *complete* copy of this letter of Grace's counsel dated January 4, 1944, is attached hereto as Appendix A.

BRIEFS OF THE PARTIES (GRACE PETITION, PP. 11-12):

In considering Grace's present claim that it was deprived of an opportunity to argue the facts, the Board should carefully examine pages 34-39 of Grace's brief. Grace there advanced, with citations to the record, every argument which, so far as we know, ever has been advanced in favor of the proposed Canal Zone-Miami operation. "The advantages to Panagra itself and to the public interest," the "prospective net earnings from the extension," "the character and adequacy of the existing service between Miami and the Canal Zone," "the length of the extension, not so much as an arbitrary number of miles, but in relation to the intervening terrain and

in relation to the essential nature of air transport," "the nature and scope of Panagra's existing service and the character of its traffic, and the manner in which it has heretofore served traffic to and from the United States,"—these very points, which Grace's petition (pages 5-6) recites as those which the Board should have considered, were argued at length in these pages of Grace's brief. When the Board made its decision, it had this statement of the case for the proposed extension. What it did not have and, in view of its decision did not need, were the statements of Pan American, Eastern, and the other parties, of the case against it.

While Grace's petition does make a vague and grudging reference to this portion of its brief (p. 12), it seeks to dispose of this by claiming that it was included "to meet the argument of unconstitutionality, which Pan American had indicated (Motion, p. 4) it would make, and to distinguish the *Oregon* case." Actually this apology is itself a sufficient demonstration of the want of merit in Grace's petition. Grace's position was (1) that Section 401(h) of the Act authorized the Board to order any extension which was "reasonable," (2) that such a construction of the Act created no constitutional doubts, and (3) *that, as stated in the point heading at the top of page 34 of its brief, and as developed in the following pages, "The amendment proposed in this case is reasonable."* What happened was that the Board disagreed with the third of Grace's contentions. We can understand Grace's disappointment at this. But the Board's failure to accept the contentions which a party has made on the facts does not warrant a claim of deprivation of fair hearing. Neither does such action justify reconsideration or reargument, apart from such a claim, when there is no specific indication that any other or different facts could now be adduced.*

* The contention seems to be, not that any *different* facts could have been presented but that a longer brief could have been written (See Grace petition, fn., p. 12).

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ORAL ARGUMENT (GRACE PETITION, PP. 12-13):

The course followed by Grace in selecting extracts from the oral argument is consistent with that already portrayed. For example, the petition quotes the opening sentence of the argument of counsel for Pan American where counsel stated that he was "to argue what I believe is called a pure question of law" (S. M. p. 5), without quoting the very next sentence in which counsel defined that "pure question of law" as being "whether the Board has power, as said in your Show Cause Order, to authorize and require an air carrier to engage in a new operation 1,200 miles long in an area never previously served by it, and which the carrier has not requested authorization to serve." Still more misleading is the failure of the petition to call attention to the extended argument on the facts made by counsel for W. R. Grace & Co. (S. M. pp. 62-68).

The simple facts are (1) that Grace brought to the Board's attention every consideration which has been or could be urged to show the "reasonableness" of the proposed Canal Zone-Miami operation; (2) that Pan American took the position that, even assuming these considerations *arguendo*, and therefore without the necessity either of subjecting them to detailed scrutiny or of adducing any contrary considerations other than the conceded facts concerning the nature of Pan American-Grace's operations, the Board did not have power to take the action proposed; and (3) that while the Board's decision was predicated on a construction of the Act less restrictive than that urged by Pan American, Grace had every opportunity to present, and did in fact present, any facts that could be claimed to bring the case within the construction of the Act adopted by the Board.

Memorandum of Pan American in Opposition to Petition of Grace for Reargument and Reconsideration.

Grace's petition advances no ground that would in any way justify the Board in requiring further time and energy to be expended upon this case.

Respectfully submitted,

ROOT, CLARK, BUCKNER & BALLANTINE,
Attorneys for Pan American Airways Corporation.

HENRY J. FRIENDLY,
Of Counsel.

CERTIFICATE OF SERVICE.

I HEREBY CERTIFY that I have this day served the foregoing memorandum upon all parties who appear of record in this proceeding by causing to be mailed a copy thereof, properly addressed, to the attorneys for each of such parties.

Dated: New York, N. Y., June 29, 1944.

JOHN P. APICELLA.

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APPENDIX A.

WRIGHT, GORDON, ZACHRY, PARLIN & CAHILL
SIXTY-THREE WALL STREET
NEW YORK

January 4, 1944

Re: Panagra Route Extension Docket No. 779.

Dear Sirs:

We are in receipt of a copy of a letter of Mr. Gambrell, counsel for Eastern Airlines, dated December 27, 1943.

Mr. Gambrell lists five points which he intends to brief and argue in support of Eastern's motion to dismiss this proceeding.

Points 1 and 5 raised by Mr. Gambrell obviously do not raise any question of the Board's jurisdiction, but involve only the issue as to whether the Board, granting that it has jurisdiction, should amend Panagra's certificate so as to provide for the extension of the route. Inasmuch as the Board has denied the cross motion of W. R. Grace & Co. to join the argument on the jurisdiction question with the argument on the merits, we believe it is clear that argument on Points 1 and 5 listed by Mr. Gambrell have no proper place in the argument now scheduled by the Board.

Point 4 raised by Mr. Gambrell relates solely to the application of Section 408 of the Civil Aeronautics Act in this proceeding. While this does raise in part a question of law, it is an entirely different question from the question as to whether the Board has jurisdiction to order the route extension. Inasmuch as we have not been advised by the Board that the issue of the application of Section 408 is to be considered at this time, we assume that this issue is likewise not properly brought before the Board on this pending argument.

Point 2 involves no question of jurisdiction of the Board, but solely a matter of its discretion, which the Board has, we believe, already conclusively determined.

This leaves only the third point raised in the letter. Even this fails to correctly state the issue now to be argued before the Board. The question is not whether the Board lacks power to grant a new route to Panagra for which it has not applied, but rather whether the Board has the power to amend Panagra's certificate so as to provide for the extension of its route from the Canal Zone to a terminal in Florida.

We believe it to be in the interests of proper and expeditious procedure that the issue before the Board on the argument now set for January 31, 1944 be so defined that irrelevant and extraneous considerations such as those raised in Mr. Gambrell's letter will not be brought into the argument and the briefs. This should be done well in advance of the time set for the filing of briefs.

Respectfully yours,

WRIGHT, GORDON, ZACHRY, PARLIN & CAHILL,
Attorneys for W. R. Grace & Co.

CIVIL AERONAUTICS BOARD
COMMERCE BUILDING,
Washington 25, D. C.
[CC to all parties]

Excerpt from Transcript of Hearings Before Examiners.

CROSS EXAMINATION OF HAROLD J. ROIG.

S. M. 1096, Line 7 to Line 16, Inclusive (R. 1449):

Q. Now, Mr. Roig, when your controversy over the United States extension was developing, Pan American addressed a letter—more than one letter perhaps—letters which are in the record—stating that they would submit the matter to arbitration.

As I understand it, you and the rest of the Grace directors have refused that offer of arbitration; is that correct?

A. Well, refused is perhaps a word of art. We have never accepted it.

Excerpts from Pan American Exhibit No. P-34

Page 1 (R. 7007).

COPY

December 1st, 1927.

Mr. Richard F. Hoyt,
25 Broad Street,
New York City.

My dear Mr. Hoyt:—

On behalf of Atlantic, Gulf & Caribbean Airways, Inc.,[*] I wish to confirm my understanding of the informal agreement between yourself, representing Keystone Aircraft Corporation, holding notes and/or other similar obligations of Huff Daland Dusters, Inc., and the writer, representing Atlantic, Gulf & Caribbean Airways, Inc., as follows:

1. No effort will be made, at this time, to combine, or affiliate, by formal contract, or otherwise, Huff Daland Dusters, Inc., and the Holding Company, Atlantic, Gulf & Caribbean Airways, Inc.

2. Huff Daland Dusters, Inc., will attempt to negotiate and acquire, with privilege to transfer advantageous concessions for commercial air operations, including actual contracts for the transportation of mail by air from the Governments of Chile, Peru and Ecuador and, possibly, Colombia.

3. Atlantic, Gulf & Caribbean Airways, Inc., shall assist Huff Daland Dusters, Inc., in securing such concessions, through such contracts as they now have or may acquire, with the United States Government.

4. Atlantic Gulf & Caribbean Airways, Inc., shall assist Huff Daland Dusters, Inc., in framing said contracts and

[*] A predecessor company of Pan American.

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concessions, with the end in view of having said contracts return at least sufficient revenue to cover scheduled operating costs, and over a period of years, the maximum net revenue to the Company.

5. When any or all concessions as outlined above shall have been secured, then the stockholders and/or Directors of Atlantic, Gulf & Caribbean Airways, Inc., and Huff Daland Dusters, Inc., shall merge the two interests, through an equitable exchange of stock, the consideration in each case being the actual market value of the aircraft and other fixed equipment of each Company, at the time the merger or consolidation shall have been effected.

If this arrangement is in accordance with your understanding, will you please initial and return this letter, retaining the enclosed carbon for your files.

Yours very truly,

J. T. TRIPPE.

JTT/s

Excerpts from Pan American Exhibit No. P-34.

Page 42 (R. 7058) (R. 7058-62).

June 20th, 1928

Mr. J. T. Trippe,
Atlantic, Gulf & Caribbean Airways, Inc.,
New York City.

Dear Mr. Trippe:

In accordance with Mr. Hoyt's desires, I confirm the following understanding between Huff Daland Dusters and Atlantic, Gulf & Caribbean Airways, Inc.

1. That Huff Daland Dusters will grant to Atlantic, Gulf & Caribbean in return for the sum of $4,000 paid to Huff Daland an option upon the concession for air mails with the Peruvian Government for a period to run until June 1st, 1929.

2. In addition to the $4,000 to be presently paid to Huff Daland Dusters, it is understood that if the option shall be exercised by Atlantic, Gulf & Caribbean that they will pay to Huff Daland Dusters the actual cost of securing this concession, and in addition if at that time the situation warrants it a proper profit to be determined by Messrs. Hoyt, Trippe and Gott, and that this profit shall be added to the above mentioned amounts.

Very truly yours,

Huff Daland Dusters, Inc.

By Edgar N. Gott
Pres.

Excerpts from Pan American Exhibit No. P-34.

Page 31 (R. 7037).

[Award of Foreign Air Mail Contract No. 5 to Pan American]

July 13, 1928.

The proposal of the Pan American Airways, Inc., of New York, N. Y. under the advertisement of May 31, 1928, for carrying the mails in safe and suitable aircraft from Landing Point (n.o.) in Key West, Florida (or such other point in the United States as may be designated by the Post Office Department) by Havana, Cuba, Merida, Mexico, Belize, British Honduras, Tegucigalpa, Republic of Honduras, Managua, Nicaragua, San Jose, Costa Rica, (or such other points in these countries as may be acceptable to their Governments) to Cristobal, Canal Zone, and from Cristobal, Canal Zone, to Key West, Florida, (or such other points as may be designated) seven (7) times a week, for the transportation of mails not to exceed eight hundred (800) pounds a single trip, on a schedule satisfactory to the Postmaster General, for a period of ten (10) years at the rate of two dollars ($2.00) per mile, is accepted, contract to be executed accordingly. Effective date of contract and mileage to be stated in a subsequent Order.

W. Irving Glover,
Second Assistant
Postmaster General.

Excerpts from Pan American Exhibit No. P-34.

Pages 32-39, Inclusive (R. 7038-55).

CONTRACT FOR FOREIGN AIR MAIL SERVICE.

Route No. F. A. M. 5.

This contract, made this 13th day of July, 1928, by and between the United States of America (by the Postmaster General) and the Pan American Airways, Inc., a corporation organized and existing under the laws of the State of New York:

WITNESSETH, That whereas the said Pan American Airways, Inc., has been accepted as contractor on Route No. F. A. M. 5 in conformity with the advertisement inviting proposals for the service specified herein, issued by the Postmaster General under date of May 31, 1928.

NOW THEREFORE, The said contractor undertakes, covenants and agrees with the United States of America:

1. To carry all United States mails (including foreign closed mails in transit through the United States) offered, not to exceed eight hundred (800) pounds a single trip, in safe and suitable aircraft, seven (7) times a week, on a schedule satisfactory to the Postmaster General from Landing Point (n.o.) at Key West, Florida (or such other point in the United States as may be designated by the Post Office Department) by Havana, Cuba, Merida, Mexico, Belize, British Honduras, Tegucigalpa, Republic of Honduras, Managua, Nicaraugua, San Jose, Costa Rica (or such other points in these countries as may be acceptable to their Governments and designated by the Post Office Department) to Cristobal, Canal Zone, and from Cristobal, Canal Zone to Key West, Florida (or such other point as may be designated) and to perform the services and undertakings in connection therewith specified in this contract for and during the term of ten (10) years commencing with the date of inauguration of service which shall not be more than six-months from the date of the acceptance of the proposal (July 13, 1928).

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Excerpts from Pan American Exhibit No. P-34.

2. To take the mail and every part of it from all United States Post Offices and deliver it and every part of it into all post offices on the route covered by this contract, unless other provision is made. The contractor also undertakes, covenants, and agrees with the United States and binds itself to be answerable in damages to the United States for the proper care and transportation of the mails, and to be accountable for any loss or damage resulting to any such mail or to any part thereof by reason of the failure to exercise due care on the part of any of the contractor's officers, agents or employees in the custody, handling or transportation thereof.

For the service herein specified, when performed in accordance with the provision of this contract and evidence thereof shall have been filed with the Postmaster General, the United States agrees to pay to the said Pan American Airways, Inc., compensation at the rate of two dollars ($2.00) per statute mile flown based on the shortest practicable airway distance between points on the route as determined by the Postmaster General, compensation for the return trip from the Canal Zone to be based on the direct distance, by the most practicable route, from Cristobal to Key West or such other point in the United States as may be designated. Payments to be made monthly as soon after the close of each month as accounts can be adjusted and settled; said pay to be subject, however, to be reduced or discontinued by the Postmaster General as hereinafter stipulated, or to be suspended in case of delinquency.

It is further stipulated and agreed by the contractor:

1. That in case of failure from any cause to perform any service required by this contract a pro-rata deduction shall be made from the compensation of the contractor on account of such omitted service, except that pro-rata pay will be allowed for the airway distance flown between stated points on the route traversed on a partially completed trip

if no delay in the mails over the ordinary means of transportation has resulted.

2. That deductions from the pay may be made for allowing the mails to become wet, damaged or destroyed; or when a grade of service is rendered inferior to that stipulated in the contract; and for the loss of or depredation upon the mails in the custody of the contractor or his agents, when such loss is due to the negligence or fault of the contractor or his agents.

It is further stipulated and agreed that the Postmaster General may annul this contract or impose fines or penalties, in his discretion, for repeated failures; for subletting the service without his permission or assigning or transferring the contract; for combining to prevent others from bidding for the performance of postal service; for failure to provide and operate safe and suitable aircraft in accordance with the requirements of the advertisement and this contract; for violating the postal laws and regulations applicable to service under this contract or for failure to perform service according to this contract. Such annulment shall not impair the right of the United States to claim damages from the contractor.

That no member of or delegate to Congress or resident commissioner shall be admitted to any share or part of this contract or agreement or to any benefit to arise therefrom.

The contractor expressly warrants that it has employed no third person to solicit or obtain this contract in its behalf; or to cause or procure the same to be obtained upon compensation in any way contingent, in whole or in part, upon such procurement; and that it has not paid, or promised or agreed to pay, to any third person, in consideration of such procurement, or in compensation for services in connection therewith, any brokerage, commission, or percentage upon the amount receivable by it hereunder; and that it has not, in estimating the contract price demanded by it, included any sum by reason of any such brokerage,

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commission, or percentage; and that all money payable to it hereunder is free from obligation to any person or persons for services rendered, or supposed to have been rendered, in the procurement of this contract. It further agrees that any breach of this warranty shall constitute adequate cause for the annulment of this contract by the United States, and that the United States may retain to its own use from any sums due or to become due thereunder, an amount equal to any brokerage, commission, or percentage so paid or agreed to be paid.

It is further stipulated and agreed that this contract may be terminated by Congress, or by the Postmaster General whenever, in his judgment, the interest of the postal service shall so require, in which latter event the contractor shall be allowed as full indemnity one month's extra pay (based on the average monthly pay), provided such termination is not due to delinquency on the part of the contractor or his agents.

It is further stipulated and agreed:

1. That during the continuance of this contract, if the Postal interests shall so require, by mutual agreement between the contractor and the Postmaster General, the contract rate of pay hereunder may be changed, but shall never exceed the rate herein provided.

2. That the Postmaster General may, as the needs of the service require, increase or decrease the number of intermediate stops, the number of trips per week, change the termini of the route, dispatch mail on any plane of the contractor flown over the route and change or modify the schedule.

3. That the Postmaster General may, with the consent of the contractor, include Guatemala and Salvador in this route and extend this route from Cristobal, Canal Zone by Cartagena, Colombia, Maracaibo, Venezuela, Port of Spain, Trinidad, Curacao, Dutch West Indies, La Guaira (Puerto

Caracas), Venezuela, Georgetown, British Guiana, to Paramaribo, Dutch Guiana.

4. That this contract is also subject to all the provisions of the advertisement (though not all specifically stated herein) and to the provisions of the Postal Laws and Regulations applicable to this service.

IN WITNESS WHEREOF, The parties hereto have executed this contract.

THE UNITED STATES OF AMERICA

By HARRY S. NEW
Postmaster General D

Signed Aug. 22, 1928
in the presence of
ALICE MUMMERLOFF

PAN AMERICAN AIRWAYS, INC.

by J. T. TRIPPE, *President*
Contractor

Signed August 11, 1928

Witnesses:
ROBERT G. THACH
E. S. SWAGGERTY

Excerpts from Pan American Exhibit No. P-34.

The United States bonds/notes described in the annexed schedule are hereby pledged as security for the performance and fulfillment of the foregoing undertaking in accordance with Section 1126 of the Revenue Act of 1926, approved February 26, 1926 and Treasury Department Circular No. 154, dated April 30, 1926.

PAN AMERICAN AIRWAYS, INC.

By J. T. TRIPPE, *President*
Contractor

Approved as to fact:
CHASE C. GOVE
Acting—Second Assistant
Postmaster General

Approved as to form:
HORACE J. DONNELLY
Solicitor

ERW

SEB

I, Robert G. Thach, certify that I am the Asst. Secretary of the corporation named as contractor herein; that J. T. Trippe who signed this contract on behalf of the contractor, was then President of the said corporation; that said contract was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

ROBERT G. THACH
(Corporate Seal)

Excerpts from Pan American Exhibit No. P-34.

CERTIFICATE OF OATH OF CONTRACTOR

I, the undersigned, being employed in the care, custody and conveyance of the mail as contractor on the route named in the foregoing contract, do solemnly swear that I will faithfully perform all the duties required of me, and abstain from everything forbidden by the laws in relation to the establishment of post offices and post roads within the United States; and that I will honestly and truly account for and pay over any money belonging to the said United States which may come into my possession or control; and I also further swear that I will support the Constitution of the United States: So help me God.

J. T. TRIPPE, President
PAN AMERICAN AIRWAYS, INC.
Contractor

Sworn to and subscribed before me a Notary Public this 11th day of August, 1928.

E. S. SWAGGERTY
Notary Public

Schedule of United States bonds deposited as collateral security for performance of service on Route No. F. A. M. 5, as described in the foregoing contract.

Title of bonds	Coupon or Registered	Total face Amount	Denomination	Serial No.
Fourth Liberty Loan 4¼% 1933-1938	Coupon with Oct. 15, 1928 and subsequent coupons attached.	$1,000	$1,000	B02401292

Excerpts from Pan American Exhibit No. P-34.

Page 43 (R. 7059).

AVIATION CORPORATION OF THE AMERICAS.

Minutes of Special Meeting of Board of Directors
July 18, 1928.

* * * *

Upon motion duly made and seconded, and after consideration, the following resolution was adopted:

> RESOLVED, that the proper officer or officers of this Corporation be and they hereby are authorized, empowered and directed to cause to be organized under the laws of Peru a corporation having as its general objects and purposes the conduct, management and/or supervision of aviation activities, said corporation to have such authorized capital stock as shall be determined and designated by Messrs. Richard F. Hoyt, C. V. Whitney and J. T. Trippe, and that upon the completion of the organization of such Peruvian corporation, the proper officer or officers of this Corporation be and they hereby are authorized, empowered and directed to subscribe and pay for the capital stock of said Peruvian corporation up to but not exceeding the amount of $10,000, and to transfer or cause to be transferred to such Peruvian corporation the options and concessions for aviation activities in Peru heretofore obtained by Huff-Daland Dusters, Inc., and heretofore transferred to Atlantic, Gulf & Caribbean Airways, Inc. and included in the assets and property of said Atlantic, Gulf & Caribbean Airways, Inc., recently acquired by this Corporation.

Excerpts from Pan American Exhibit No. P-34.

Page 46 (R. 7062).

[Letter evidencing August, 1928 Agreement between Grace and Pan American]

August 31, 1928.

AVIATION CORPORATION OF THE AMERICAS,
100 East 42nd Street,
New York City.

Attention: Mr. J. T. Trippe

Dear Sirs:

This will confirm arrangement under which we will associate for the commencement of an airplane service in Peru with the view of ultimately inaugurating a through mail service from the Panama Canal to Valparaiso, Chile.

A corporation will be formed under the laws of Delaware with a capital stock of $50,000, of which $25,000 will be subscribed by yourselves and $25,000 by ourselves. This corporation will pay to Huff-Daland Dusters, Inc. the sum of $15,000 for an assignment which will convey all of the rights of that company under its present Peruvian mail contract and concession. As soon as possible after the assignment has been completed, operations will be started by this company in Peru and every effort will be made to put the business there on a paying basis.

We will in the meantime cooperate with you in studying the costs of operation on the route from the Panama Canal to Valparaiso and also the advisability of requesting the U. S. Post Office Department to advertise for a mail contract on such route and the terms of such advertisement.

If you determine that it is advisable to bid on a contract for carrying the mails between the Panama Canal and Valparaiso, the Delaware corporation above referred to will be used in such service either by an increase in its capital stock to an amount sufficient to operate on the whole route or as a subsidiary operating in Peru. In either event

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our subscriptions to the stock of the Delaware Company shall be credited at their full amount in the capital setup of the corporation operating the through service. We shall also have a reasonable time after a study of the estimated costs of such operation to determine what interest, if any, we will take in the company making the bid in addition to our initial investment of $25,000, such interest not to exceed, however, more than fifty percent of the total capitalization.

You will have charge of the operation of the service from the Canal to Valparaiso and our houses on the West Coast of South America will be the agents of the company on a reasonable compensation basis, such agency to continue during the life of transportation contracts undertaken by the company.

The details of carrying out the above must, of course, be worked out as we go along. We believe, however, that we have stated broadly the basis of our understanding.

Very truly yours,

W. R. Grace & Co.
Assistant Secretary

WFC:GVB

Excerpts from Pan American Exhibit No. P-34.

Pages 66-73, Inclusive (R. 7080-7)

FOREIGN AIR MAIL CONTRACT

Route No. 9

Cristobal, Canal Zone to Santiago, Chile
Ten Year Period
Beginning April 1, 1929.

CONTRACT FOR FOREIGN AIR MAIL SERVICE.

Route No. F. A. M. 9.

This Contract, made this 2d day of March, 1929, by and between the United States of America (by the Postmaster General) and the Pan American-Grace Airways, Inc., a corporation organized and existing under the laws of the State of Delaware, Contractor;

WITNESSETH, That whereas the said Pan American-Grace Airways, Inc., has been accepted as contractor on route No. F. A. M. 9 in conformity with the advertisement inviting proposals for the service specified herein, issued by the Postmaster General under date of January 31, 1929:

NOW THEREFORE, The said contractor undertakes, covenants and agrees with the United States of America:—

1. To carry mails for the United States of the specified load of not exceeding 800 pounds a trip each way and any excess mails required to be carried in safe and suitable aircraft from Cristobal, Canal Zone, by Buenaventura and Tumaco, Colombia, Esmeraldas and Guayaquil, Ecuador, Talara, Truxillo, Lima, Lomas and Mollendo, Peru, Arica, Iquiqui, Antofagasta, Caldera and Coquimbo to Santiago, Chile, and return, three times a week, by a schedule satisfactory to the Postmaster General, and to perform the services and undertakings in connection therewith as specified in this contract, for and during the term of ten (10) years

beginning April 1, 1929. (The contractor may be permitted to omit service south of Mollendo, Peru, for a reasonable time at the discretion of the Postmaster General, pending completion of operating arrangements.)

2. To receive and deliver the mails at each post office on the route, unless other provision is made by the Department. The contractor also undertakes, covenants and agrees with the United States and binds itself to be answerable in damages to the United States for the proper care and transportation of the mails, and to be accountable for any loss or damage resulting to any such mail or any part thereof by reason of the failure to exercise due care on the part of any of contractor's officers, agents or employees in the custody, handling or transportation thereof.

For the services herein specified when performed in accordance with the provisions of this contract and evidence thereof shall have been filed with the Postmaster General, the said contractor is to be paid by the United States at the rate of $1.80 per mile each way for the specified loan of not exceeding 800 pounds each way, plus the rate of 90 cents per pound per thousand miles or pro rata thereof for greater or less mileage for any excess mails required to be carried in the same aircraft, based on statute miles by the shortest practicable airway distance between points on the route as determined by the Postmaster General; payments to be made monthly and as soon after the close of each month as accounts can be adjusted and settled; said pay to be subject, however, to be reduced or discontinued by the Postmaster General as hereinafter stipulated, or to be suspended in case of delinquency.

It is further stipulated and agreed by the contractor—

1. That in case of failure from any cause to perform any service required by this contract a pro rata deduction shall be made from the compensation of the contractor on account of such omitted service, except that pro rata pay will be allowed for the airway distance flown between

stated points on the route traversed on a partially completed trip if no delay in the mails over the ordinary means of transportation has resulted.

2. That deduction from pay may be made for suffering the mails to become wet, damaged or destroyed, or when a grade of service is rendered inferior to that stipulated in the contract, or for the loss of or depredation upon the mails in the custody of the contractor or its agent, provided the loss is occasioned by their fault, or for other delinquencies, in the discretion of the Postmaster General.

3. That the Postmaster General may annul the contract or impose forfeitures, in his discretion, for repeated failures or for failure to perform service according to contract; for violating the Postal Laws and Regulations; for disobeying instructions of the Post Office Department; for subletting service without the consent of the Postmaster General, or assigning or transferring the contract; for combining to prevent others from bidding for the performance of postal service, and such annulment shall not impair the right of the Department to claim damages from the contractor and its surety.

It is further stipulated and agreed—

1. That if in the opinion of the Postmaster General the development of aircraft should be such as to render the equipment used on the route obsolete, so that it no longer meets the needs of the Department, the Postmaster General may call upon the contractor to provide suitable equipment and in the event of its failure to do so within such reasonable time as shall be given it, may terminate the contract.

2. That mail apartments in all planes shall be made fireproof to the satisfaction of the Post Office Department.

3. That the Department may increase or decrease the number of intermediate stops, or the number of trips per week, and change the termini of the route, dispatch mail on

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any plane of the contractor flown over the route, and modify or change the schedule as the needs of the service require; and the Department may also extend or curtail the route, with pro rata allowance or reduction of pay.

4. That service on this route may be extended at the option of the Post Office Department from Santiago, Chile, by such intermediate points as the Postmaster General may determine, to Buenos Aires, Argentine, and Montevideo, Uruguay, at not exceeding pro rata allowance of additional pay.

5. That the contractor must make its own arrangements for landing fields, lighthouses, radio stations and such other aids to navigation as may be necessary for the proper performance of the service.

6. That this contract covers all mails to and from the United States or its possessions, including parcel post; provided that the contractor shall have the right to make arrangements with intermediate countries for the exchange of local mails between such countries.

7. That during the continuance of this contract, if the postal interests shall require, by mutual agreement between the contractor and the Postmaster General, the contract rate of pay herein may be changed, but shall never exceed the rate herein provided.

8. That the contractor may be permitted to sublet the service to acceptable persons, by permission of the Postmaster General, at not less than the contract rate of pay.

9. That no member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract or agreement or to any benefit to arise thereupon.

10. That the contractor shall use flying equipment on the route of United States manufacture, shall use other equipment if practicable of United States manufacture, and

shall employ necessary pilots and flying crews of United States citizenship where practicable to do so.

The contractor warrants that it has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to annul the contract, or, in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business.

This contract is also subject to all the provisions of the advertisement (though not all specifically stated herein) and to the provisions of the Postal Laws and Regulations applicable to this service.

In Witness Whereof, The parties hereto have executed this contract.

The United States of America

By (Signed) Harry S. New,
Postmaster General

Signed March 4, 1929, in
the presence of
(Signed) E. R. White

Pan American-Grace Airways, Inc.,

By (Signed) J. T. Trippe, Agent
Contractor

Signed March 4, 1929.

Witnesses:
(Signed) Wm. P. Palmer
W. F. Cogswell

Excerpts from Pan American Exhibit No. P-34.

The United States bonds/notes described in the annexed schedule are hereby pledged as security for the performance and fulfillment of the foregoing undertaking in accordance with section 1126 of the Revenue Act of 1926, approved February 26, 1926, and Treasury Department Circular No. 154, dated April 30, 1926.

PAN AMERICAN-GRACE AIRWAYS, INC.,

By (Signed) J. T. TRIPPE, Agent
Contractor

Approved as to fact:

(Signed) W. IRVING GLOVER (cog)
Second Assistant
Postmaster General

Approved as to form:

(Signed) HORACE J. DONNELLY
Solicitor

I, W. F. COGSWELL, certify that I am the Secretary of the corporation named as contractor herein; that J. T. TRIPPE who signed this contract on behalf of the contractor, was then Agent of the said corporation; that said contract was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

(Signed) W. F. COGSWELL

(Corporate Seal)

Excerpts from Pan American Exhibit No. P-34.

CERTIFICATE OF OATH OF CONTRACTOR

I, the undersigned, being employed in the care, custody and conveyance of the mail as contractor on the route named in the foregoing contract, do solemnly swear that I will faithfully perform all the duties required of me, and abstain from everything forbidden by the laws in relation to the establishment of post offices and post roads within the United States; and that I will honestly and truly account for and pay over any money belonging to the said United States which may come into my possession or control; and I also further swear that I will support the Constitution of the United States: So help me God.

(Signed) J. T. TRIPPE, Agent
PAN AMERICAN-GRACE AIRWAYS, INC.
Contractor.

Sworn to and subscribed before me a Notary Public this 4 day of March, 1929.

(Signed) CHARLES E. WARREN
Notary Public
My commission expires
Nov. 4, 1930

(Seal)

Schedule of United States bonds deposited as collateral security for performance of service on Route F. A. M. 9, as described in the foregoing contract.

Title of bond	Coupon	Total face amount	Denomination
United States of America, 3⅜% Treasury Bond of 1940-1943	June 15, 1929, and subsequent coupons attached	$10,000	$10,000 No. 6476 F

59

Excerpts from Pan American Exhibit No. P-34.

August 20, 1929

Order

From October 12, 1929, extend service from Santiago, Chile, by Buenos Aires, Argentina, to Montevideo, Uruguay, and return, once a week, including such intermediate points as may be acceptable to the Governments of these countries and designated by the U. S. Post Office Department, the contractor to be allowed $1.80 per statute mile flown each way based on the shortest practicable airway distance between points on the route as determined by the Postmaster General for the specified load of not exceeding 800 pounds each way, plus 90 cents per pound per thousand miles or pro rata thereof for greater or less mileage for any excess mails required to be carried in the same aircraft.

W. Irving Glover
Second Assistant
Postmaster General

Excerpts from Pan American Exhibit No. P-35.

Page 16 (R. 7107)

[Agreement of February 14, 1939.]

1. One of the Grace directors of Panagra (who shall also be a director of Grace) will be elected President of Panagra and placed in responsible charge of the management of the Company. If at any time the Company's affairs are not being conducted to Pan American's reasonable satisfaction, then the President will resign.

2. Pan American will inaugurate on or before April 1, 1939, a second direct trip between Miami and Cristobal, and will maintain an adequate direct connecting service between Miami, or some other U. S. port agreed upon, and Cristobal, connecting with Panagra's through mail schedules. If at any time Pan American shall not comply with the foregoing, then Pan American will cause its directors on the Board of Panagra to take such action as will permit Panagra's applying to the C.A.A. for a certificate to operate this connecting service, provided that, irrespective of any determination made as provided in paragraph 4, Pan American shall not be in any way precluded from maintaining before the C.A.A. that its service is satisfactory and should be continued and that no other service is required in the public interest. With the exception of the second direct trip between Miami and Cristobal above referred to, Pan American shall not be obligated to operate any schedules and services not designated by the Post Office Department as mail schedules but will use their best efforts to have designated as mail schedules any additional trips required to make connection with any increase in Panagra's through mail schedules.

3. It is agreeable to the parties that Pan American-Grace shall continue to utilize the respective services of

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Grace and Pan American and pay service fees in the same proportion as presently allowed, provided that the services to be rendered by the respective parties are satisfactory to Pan American-Grace.

4. Any disputes arising under this general plan and every phase thereof, including, without limiting the generality of the foregoing, determination of "Pan American's reasonable satisfaction" referred to in paragraph 1 above and of "adequate direct connecting service" referred to in paragraph 2 above, which cannot be settled by the Board of Panagra, shall be determined by Messrs. D. S. Iglehart and C. V. Whitney. If Mr. Iglehart or Mr. Whitney shall be unable to act, or unable to agree in connection with any matter arising under the foregoing paragraphs, then, unless otherwise agreed between Grace and Pan American, such matters shall be determined by arbitration by an arbitrator or arbitrators appointed by Messrs. Iglehart and Whitney, or failing such appointment, by three arbitrators, one appointed by Grace, one by Pan American, and a third by these two, and the party adjudged in default shall, at the discretion of the Arbitrator, be given such reasonable time to correct the default as the Arbitrator may fix.

5. This agreement shall continue to February 1, 1944, and thereafter until cancelled by Pan American or Grace on six months' written notice.

Agreed—February 14, 1939.

W. R. Grace & Co.

By Harold J. Roig,
Vice-President.

Pan American Airways Corporation

By J. T. Trippe,
President.

Excerpts from Pan American Exhibit No. P-35.

Page 36 (R. 7127).

July 22, 1941

W. R. Grace & Company,
7 Hanover Square,
New York, N. Y.

Dear Sirs:

A special meeting of the Board of Directors of Pan American-Grace Airways, Inc. was called for June 18th to consider a proposal that Pan American-Grace Airways, Inc. extend its route from the Canal Zone to a terminal in the United States at New Orleans and apply to the Civil Aeronautics Board for the necessary certificate of convenience and necessity.

The proposal that Pan American-Grace Airways, Inc. or, in the alternative, W. R. Grace & Company should apply for a certificate to New Orleans was made in the fall of 1938, prior to the agreement of February 14, 1939, between W. R. Grace & Company and Pan American Airways Corporation. When the matter was again brought up by you in January, 1941, we stated that the position was fully covered by that agreement. When the matter was further raised by you in June, our representatives on the Pan American-Grace Airways, Inc. Board referred this matter to the Executive Committee of Pan American Airways Corporation.

The proposal was considered at ensuing meetings of the Executive Committee. The matter was also considered by our Board of Directors at a meeting on July 1st, in line with the suggestion in Mr. Iglehart's letter of June 20th to Mr. Whitney.

As you have since been advised, our board of directors, after mature deliberation, has unanimously reached the conclusion that it would not be in our Company's interest, or in the interest of our jointly owned company, or in the public interest, for our representatives on the Pan American-

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Grace Airways, Inc. Board of Directors to approve this proposal.

In line with the agreement of February 14, 1939, between W. R. Grace & Company and Pan American Airways Corporation, however, we are glad to submit the matters involved to arbitration as therein provided, and we confirm the request that Mr. Whitney made yesterday to Mr. Iglehart, that such arbitration be held at once.

Very truly yours,

PAN AMERICAN AIRWAYS CORPORATION

By.....

H. PRESTON MORRIS, Secretary

Pages 57-60, Inclusive (R. 7168-71)

November 4, 1941

W. R. Grace & Company,
7 Hanover Square,
New York, New York

Dear Sirs:

We have your letter of October 27 in reply to our letter of October 22. Our letter of October 22 was not, as you characterize it, "a categorical refusal to provide connecting service for Panagra's fourth trip as at present operated." Our letter merely pointed out that this fourth trip is not properly spaced to provide adequate through mail or passenger service, and suggested that Mr. Roig or Mr. Harris confer with our System officials with a view to arranging suitable schedules for four adequately spaced trips per week. As a matter of fact, we have been at all times, and still are, anxious to institute a fourth schedule between Miami and the Canal Zone and it was with a view of presenting the matter in the most favorable light to the Post Office Department that we suggested in our letter of October

22 that Mr. Roig or Mr. Harris work out a revised schedule with our System officials.

The proper officials of the Post Office Department have been asked to approve a fourth direct schedule on a basis which would afford connections with the fourth schedule which has been inaugurated on our joint service. The Department will not approve at this time a fourth direct mail trip between Miami and the Canal Zone to connect with the new schedule inaugurated on the West Coast.

In view of this fact there is no occasion to reply to the other statements contained in your letter, although it should be said that with regard to most of such statements we are in complete disagreement.

We again ask that Mr. Roig or Mr. Harris cooperate in the preparation of an adequate schedule for a through fourth trip. In our opinion an adequate fourth through schedule would move more United States mail than would a trip connecting with the present fourth trip of Pan American-Grace, and would enhance the likelihood of the Post Office Department being willing to designate a fourth direct trip between Miami and the Canal Zone as a regular mail schedule for Pan American Airways. Obviously, the interests of Pan American Airways are prejudiced until this can be accomplished.

There is clearly not the slightest occasion for holding the special meeting of the Board of Directors of Pan American-Grace which has been called for November 5 to consider a proposal that Pan American-Grace extend its route from the Canal Zone to Miami or other terminal or terminals in the United States, and in this connection apply to the Civil Aeronautics Board for the necessary certificate of convenience and necessity.

Substantially the same proposal has been repeatedly advanced by the Grace interests in direct conflict with the agreement under which Pan American-Grace was organized.

Such a proposal was first advanced by the Grace interests in the winter of 1938-1939, when, after extended negotia-

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tions the parties came to an agreement on February 14, 1939, effective until February 1, 1944. Notwithstanding the fact that such agreement disposed of the matter, a like proposal was again advanced by the Grace interests in January, 1941, when a special meeting of the Board of Directors of Pan American-Grace was called for the purpose of considering a proposal that the joint company extend its route to New Orleans. However, Pan American again considered the matter and came to the conclusion that such an extension would not only constitute an unwarranted departure from the prior agreements of the two stockholders, but would not be in the interests of Pan American-Grace itself, and we so advised Mr. Roig.

Six months later, however, another special meeting of the Board of Directors of Pan American-Grace was called, this time for June 18, 1941, to consider the proposal that the joint company extend its route to New Orleans. The matter was again presented to the directors of our Company with the result that they were again unanimously of the opinion that it would be neither in the interests of our Company or of our jointly owned company, or in the public interest, for our representatives on the Board of Directors of Pan American-Grace to approve such proposal. We wrote you under date of July 22, 1941, confirming this, but also advising you that in line with our agreement with you of February 14, 1939, we were glad to submit the matter to arbitration and requested that such arbitration be held at once. As you know, we have never had a reply to our letter of July 22, 1941 (a copy of which is attached hereto).

Nothing has transpired since which could in any way alter the position which we have heretofore taken. The adequate connecting service provided for in the agreement of February 14, 1939 has been maintained and, as stated above, we are not only willing, but anxious to inaugurate a fourth schedule between the Canal Zone and the United States as soon as approval by the postal authorities can be obtained. Such approval is, of course, essential not only

from a business point of view but is also required by our agreement with you of February 14, 1939 which provides that, with the exception of a second trip between Miami and the Canal Zone, Pan American Airways "shall not be obligated to operate any schedules and services not designated by the Post Office Department as mail schedules."

Under these circumstances no useful purpose can be served by further discussion of the proposed extension by our respective representatives on the Board of Directors of Pan American-Grace, particularly these days when our officials are so much occupied with matters having to do with the National Defense. Accordingly our representatives on the Board do not expect to attend the special meeting which has been called for November 5.

We remain willing, however, as we stated in our letter of July 22, 1941, to arbitrate the matters involved in accordance with the provisions of our agreement with you of February 14, 1939, and we repeat the request therein made for such arbitration. We will appreciate it if you will advise us of your position in this respect.

Very truly yours,

PAN AMERICAN AIRWAYS CORPORATION

.....

Evan E. Young
Vice President

Enclosure

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Pan American Exhibit No. P-149.

(R. 7952)

Letterhead of
RICHARD F. HOYT
25 Broad Street
New York City

August 17, 1928.

Mr. Juan Trippe,
Pan-American Airways, Inc.,
100 E. 42nd Street,
New York City.

Dear Juan:

My understanding of our arrangement with the Grace Line is that it is only to cover the South American route from Colon down the west coast, but I notice in the memo. you have submitted to them you include operations in Colombia.

Sincerely,

(Sgd.) DICK

RFH-W

Excerpt from W. R. Grace & Co. Exhibit No. G-14.

(R. 5095)

[From Minute of Board of Directors of W. R. Grace & Co., February 20, 1929.]

A proposal was submitted to create and establish a permanent air service from Panama to Valparaiso on basis of three sailings per week at cost of not exceeding $1,000,000, half of which to be contributed by us and the other half by the Pan American Airways Corporation. According to figures submitted it was estimated that $800,000 of this sum would be spent in actual equipment, airports, landing stations, etc. and that the service would consist of two sections, namely, Panama/Callao and Callao/Valparaiso, each section to have four planes with four extra motors, etc.; balance of $200,000 to constitute working capital. Authority was given to go ahead on this basis.

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APPENDIX IV

ITEM 9

Analysis of Panagra passenger traffic to show the number of passengers originating in and destined to the United States by months from 1938 to the latest month available. Data concerning origin or destination in the United States is not available, but a breakdown between the Eastern and Western Divisions is shown. The Western Division figures include passengers originating in and destined to points in Central America.

In the total number of passengers carried on Panagra, which is also shown for the sake of comparison, all passengers stopping over longer than the regular overnight stops are counted again each time they continue their trip.

		SOUTHBOUND			NORTHBOUND		
	Total no. Pass. on Panagra Route	Pass. orig. in Eastern Division	Pass. orig. in Western Division(1)	Total U. S. S/B Traffic orig. in U. S.	Panagra Pass. destined to Eastern Division	Panagra Pass. destined to Western Division(2)	Total U. S. N/B Traffic destined to U. S.
1938							
Jan.	714	....	....	51	....	....	45
Feb.	604	....	....	39	....	....	31
Mar.	866	....	....	34	....	....	38
April	644	....	....	38	....	....	24
May	662	....	....	28	....	....	44
June	565	....	....	34	....	....	41
July	611	....	....	39	....	....	37
Aug.	553	....	....	18	....	....	50
Sept.	494	....	....	28	....	....	30
Oct.	647	....	....	38	....	....	40
Nov.	717	....	....	51	....	....	40
Dec.	775	47	16	63	46	13	59
1939							
Jan.	740	36	14	50	33	12	45
Feb.	684	21	16	37	34	6	40
Mar.	806	23	21	44	23	12	35
April	723	25	14	39	37	8	45
May	680	25	11	36	32	9	41
June	703	35	17	52	40	20	60

(1) These figures include passengers originating in Central America. Figures for U. S. Passengers only are not available for the Western Division.

(2) These figures include passengers destined to Central America. Figures for U. S. Passengers only are not available for the Western Division.

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APPENDIX IV

ITEM 9

	SOUTHBOUND				NORTHBOUND		
	Total no. Pass. on Panagra Route	Pass. orig. in Eastern Division	Pass. orig. in Western Division(1)	Total U. S. S/B Traffic orig. in U. S.	Panagra Pass. destined to Eastern Division	Panagra Pass. destined to Western Division(2)	Total U. S. N/B Traffic destined to U. S.
1939							
July	932	41	14	55	45	13	58
Aug	829	32	8	40	38	16	54
Sept	821	32	25	57	54	26	80
Oct	895	36	21	57	27	22	49
Nov	907	31	17	48	33	24	57
Dec	907	39	30	69	47	21	68
1940							
Jan	952	42	29	71	34	16	50
Feb	1086	42	36	78	51	20	71
Mar	1212	52	41	93	51	20	71
April	1083	40	21	61	58	26	84
May	990	46	25	71	75	18	93
June	1057	60	31	91	64	32	96
July	1275	57	48	105	83	22	105
Aug	1374	72	24	96	77	30	107
Sept	1320	52	23	75	97	15	112
Oct	1365	63	24	87	90	17	107
Nov	1404	72	26	98	82	19	101
Dec	1482	64	18	82	98	22	120
1941							
Jan	1538	78	14	92	65	18	83
Feb	1756	80	54	134	78	11	89
Mar	2066	47	35	82	92	40	132
April	2110	65	19	84	79	40	119
May	2082	75	19	94	118	40	158

(1) These figures include passengers originating in Central America. Figures for U. S. Passengers only are not available for the Western Division.

(2) These figures include passengers destined to Central America. Figures for U. S. Passengers only are not available for the Western Division.

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APPENDIX IV

ITEM 9

	SOUTHBOUND				NORTHBOUND		
	Total no. Pass. on Panagra Route	Pass. orig. in Eastern Division	Pass. orig. in Western Division(1)	Total U. S. S/B Traffic orig. in U. S.	Panagra Pass. destined to Eastern Division	Panagra Pass. destined to Western Division(2)	Total U. S. N/B Traffic destined to U. S.
1941							
June	2302	85	32	117	85	22	107
July	2667	56	47	103	98	23	121
Aug.	3324	56	32	88	98	45	143
Sept.	3539	61	25	86	105	63	168
Oct.	3760	65	24	89	97	53	150
Nov.	3188	77	25	105	96	25	121
Dec.	3314	45	29	74	107	62	169
1942							
Jan.	3164	79	69	148	104	33	137
Feb.	3171	104	67	171	113	39	152
Mar.	3591	124	100	224	155	64	219
April	3578	159	88	247	207	78	285
May	4179	164	119	283	220	113	333
June	3826	239	83	322	235	90	325
July	4407	229	100	329	182	51	233
Aug.	4917	197	75	272	236	67	303
Sept.	4873	219	113	332	268	68	336
Oct.	5433	247	60	307	192	84	276
Nov.	5117	291	55	346	184	51	235
Dec.	---	---	---	---	---	---	---

(1) These figures include passengers originating in Central America. Figures for U. S. Passengers only are not available for the Western Division.

(2) These figures include passengers destined to Central America. Figures for U. S. Passengers only are not available for the Western Division.

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IN THE

United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

No. 19520.

W. R. GRACE & CO.,

Petitioner,

v.

CIVIL AERONAUTICS BOARD,
PAN AMERICAN AIRWAYS CORPORATION,
PAN AMERICAN AIRWAYS, INC.,
EASTERN AIR LINES, INC.,
NATIONAL AIRLINES, INC.,
CHICAGO AND SOUTHERN AIR LINES, INC.,
TACA, S. A.,
DEPARTMENT OF JUSTICE OF THE UNITED STATES OF AMERICA,

and

PAN AMERICAN-GRACE AIRWAYS, INC.,

Respondents.

APPENDIX TO

BRIEF OF EASTERN AIR LINES, INC., RESPONDENT

GAMBRELL & WHITE,
Attorneys for Eastern Air Lines, Inc.

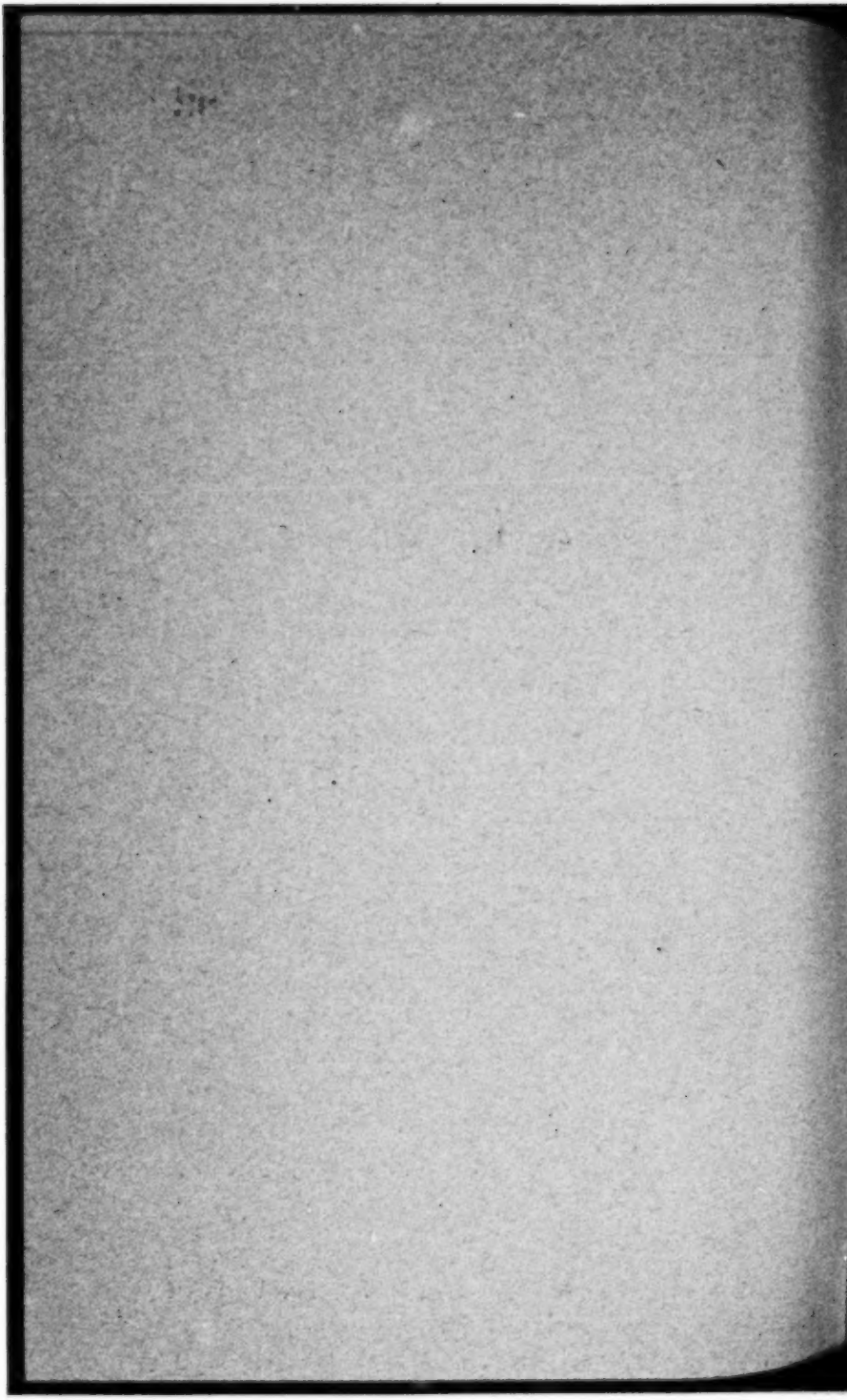
E. SMYTHE GAMBRELL,
W. GLEN HARLAN,
HAROLD L. RUSSELL,
of Counsel.

10 Rockefeller Plaza,
New York, N. Y.

September 29, 1945.

UNITED STATES CIRCUIT COURT OF APPEALS
FILED
OCT 30 1945
A. M. BELL CLERK
SECOND CIRCUIT

APPEAL PRINTING CO., INC., 240 CEDAR ST., NEW YORK, WO 2-2040



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II

Appendix A

Excerpt from Eastern's Brief to the Board on Motion to Dismiss, dated January 14, 1944, page 17, line 18, to page 20, line 12, Inclusive (R. 8648-8651)

"II.

"SECTION 401 (h) OF THE ACT, UNDER ANY REASONABLE INTERPRETATION, DOES NOT AUTHORIZE THE COMPULSORY NEW SERVICE UNDER CONSIDERATION IN THIS CASE.

"Section 401 (h) authorizes the Board on its own motion to 'alter, amend or modify' an existing certificate. No power is given to 'extend' a route. It should require no argument to demonstrate that authorization of a 1200-mile route between the United States and the Canal Zone would not merely 'alter, amend or modify' Panagra's existing certificate. Such a route would be as long as Eastern's Route 6 or Route 10, and would be greater than the entire system mileage of several air carriers.

"The Board has recognized that Section 401(h) confers only a very limited power to amend certificates. In its Annual Report for 1942, at page 15, the Board said:

> '. . . the Board has power under section 401(h) of the Act to require "amendments" to certificates on its own initiative, without application by the carrier, after notice and hearing. The word "amendment" is vague and *carries with it a limited concept.* Consequently, it has been argued that the Act now appears to contemplate that the Board shall await the filing of applications in order to authorize *any substantial new service*' (Italics supplied).

Clearly a 'limited concept' of amendment does not contemplate a 1200-mile new route.

"The word 'alter' has been defined, judicially and otherwise, as meaning 'to change without destroying the

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identity of the thing changed'. *Smith* v. *United States*, 74 F. (2d) 941, 942 (C.C.A. 5th, 1935). Webster's Dictionary shows that the three words—'alter', 'amend' and 'modify'—are synonymous, each containing the limitation that the identity of the thing changed shall not be destroyed.

"It is unnecessary to argue extensively, or to refer to any of the evidence introduced in this proceeding, to demonstrate that the authorization for Panagra of a route between the United States and the Canal Zone would change the 'identity' of Panagra. Grace and Pan American agree on this point. At page 5 of the petition of Grace under Docket 707, Grace asserts that authorization of the new route between the Canal Zone and the United States 'would give the Panagra Route the standing of an independent American international air line with a terminal in the United States such as every other comparable American foreign air service has.' Clearly Grace's purpose in requesting the institution of this proceeding was to change the 'identity' of Panagra from that of a subordinate and integral part of the Pan American world monopoly to that of an independent international airline.

"At page 3 of Pan American's 'Answer' under Docket 779, Pan American asserts:

> 'The capital invested in Pan American-Grace definitely was not dedicated to the purpose of engaging in air transportation between the United States and the Canal Zone. On the contrary, Pan American-Grace was organized as a joint venture on the part of its two founders *for the limited purpose of engaging in air transportation on the west coast of South America.* The capital invested in it was devoted to that purpose and to that purpose alone.'

"It is clear from the pleadings that Panagra is now engaged strictly in Latin American air transportation, and also provides connections for the services of Pan American to and from Miami and Brownsville. Panagra is now

in competition with Grace Line, Inc., wholly owned subsidiary of Grace, Panagra's co-owner, for traffic along the west coast of South America. It is also in competition with its other co-owner, Pan American, for traffic between the Canal Zone and Buenos Aires. If Panagra were permitted to operate to and from the United States, it would be in competition with *both* of its owners for traffic all of the way from New York and other northern points to the South American points jointly served. Aside from the fact that such competition by a controlled subsidiary is contrary to the Civil Aeronautics Act and the anti-trust laws, it is apparent that authorization of such service for Panagra would substantially change Panagra's 'identity', its purpose and its functions, and would be a 'substantial new service' in conflict with the 'limited concept' which the Board has said the word 'amendment' connotes.

"In this connection it may be noted that even the dissenting justices in *Interstate Commerce Commission* v. *Oregon-Washington R. & Nav. Co., supra,* unquestionably would agree that the new service under consideration for Panagra would constitute more than an 'extension' of Panagra's present service. At 288 U. S. page 44, the dissenting opinion states that the word 'extension' does not 'fairly connote a prolongation so vast and sudden as to work an utter transformation of the character of the road, making what was extended the incident and the extension the principal.' The dissenting members of the Court concluded that a 1.2% addition to the system of the railroad in that case would not be so great as to change the character or identity of the thing changed. It seems reasonable to assume, however, that, even in the minds of the dissenting justices, a 1200-mile extension of an airline into a country which it does not presently serve and which would become its primary source of traffic, would result in a change in identity or character of the airline. The proposed new authorization for Panagra would be more than even an 'extension.' *A fortiori* it would be more than an alteration, amendment or modification (in the language of Section 401(h) of the Act) of Panagra's certificate."

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Appendix B

Letter of Counsel for Grace to the Board (R. 8846J-8846K)

WRIGHT, GORDON, ZACHRY, PARLIN & CAHILL
Sixty-Three Wall Street
New York

January 4, 1944

"Re: Panagra Route Extension Docket No. 779

"Dear Sirs:

"We are in receipt of a copy of a letter of Mr. Gambrell, counsel for Eastern Airlines, dated December 27, 1943.

"Mr. Gambrell lists five points which he intends to brief and argue in support of Eastern's motion to dismiss this proceeding.

"Points 1 and 5 raised by Mr. Gambrell obviously do not raise any question of the Board's jurisdiction, but involve only the issue as to whether the Board, granting that it has jurisdiction, should amend Panagra's certificate so as to provide for the extension of the route. Inasmuch as the Board has denied the cross motion of W. R. Grace & Co. to join the argument on the jurisdiction question with the argument on the merits, we believe it is clear that argument on Points 1 and 5 listed by Mr. Gambrell have no proper place in the argument now scheduled by the Board.

"Point 4 raised by Mr. Gambrell relates solely to the application of Section 408 of the Civil Aeronautics Act in this proceeding. While this does raise in part a question of law, it is an entirely different question from the question as to whether the Board has jurisdiction to order the route extension. Inasmuch as we have not been advised by the Board that the issue of the application of Section 408 is to be considered at this time, we assume

that this issue is likewise not properly brought before the Board on this pending argument.

"Point 2 involves no question of jurisdiction of the Board, but solely a matter of its discretion, which the Board has, we believe, already conclusively determined.

"This leaves only the third point raised in the letter. Even this fails to correctly state the issue now to be argued before the Board. The question is not whether the Board lacks power to grant a new route to Panagra for which it has not applied, but rather whether the Board has the power to amend Panagra's certificate so as to provide for the extension of its route from the Canal Zone to a terminal in Florida.

"We believe it to be in the interests of proper and expeditious procedure that the issue before the Board on the argument now set for January 31, 1944, be so defined that irrelevant and extraneous considerations such as those raised in Mr. Gambrell's letter will not be brought into the argument and the briefs. This should be done well in advance of the time set for the filing of briefs.

Respectfully yours,

WRIGHT, GORDON, ZACHRY, PARLIN & CAHILL
Attorneys for W. R. Grace & Co."

"Civil Aeronautics Board
Commerce Building
Washington 25, D. C.
(CC to all parties)"

Appendix C

Excerpt from Oral Argument Before the Board in Behalf of Eastern (Stenographic Report, page 33, line 18, to page 34, line 3; R. 8440-8441)

"Public Counsel has suggested in his brief that we should discuss purely the legal question here and not refer to the facts at all.

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"Now, I don't think that this Board can decide a question of this character in a vacuum. There is no court that I know of that has ever decided a case without reference to the facts, and I think we have to refer to the facts in order to get the legal question in proper perspective.

"The question here is whether you are going to dismiss this proceeding, not whether you are going to dismiss some other proceeding some time or all proceedings of this type, but just whether you are going to dismiss this particular proceeding, Docket 779, so I think it is necessary to look at the facts."

Appendix D

Excerpt from Brief of Grace to Board, dated January 15, 1944, pages 34-39 Inclusive (R. 8619-8624)

"D. The amendment proposed in this case is reasonable

"The following facts, taken from the Record in Docket 779 amply demonstrate the reasonableness of an exercise by the Board of its power to 'require' Panagra to come through to a Florida terminal.

"1. Panagra's Existing Service.

"Panagra's growth and expansion over the ten year period 1933 to 1942 effectively demonstrate not only that it is able to undertake additional service without difficulty, but also that the proposed extension is merely a further development in Panagra's natural growth. The following is a brief summary of this development (795-9; Ex. PG-4, Item 5):

VIII

	1933	1942
Route Miles	4551.5	8551.2
Airplane Miles	1,162,394	4,033,194
Passenger Miles	4,508,720	43,528,646
Frequencies	Twice weekly	Daily (plus additional trips)
Commercial Revenue	$426,000	$4,788,000
Investment in Aircraft & Ground Facilities	$955,000	$3,791,000

"During this period, the following additional increases are reflected:

Average ton miles	355%
Used ton miles	680%
Passenger revenue	1046%
Express & freight revenue	3160%

"2. Pan American's Traffic on the Miami-Canal Zone Route.

"The proposed service is on a route on which there already is extremely heavy traffic, with unlimited possibilities of further development. This is apparent from the following statistics on the volume of passenger traffic, mail and express on the Miami-Canal Zone route as operated by Pan American during the years 1940-42 (Exs. P-2; P-14):

Year	Total Passengers Carried	Pounds of Mail	Pounds of Express
Southbound			
1940	1241	87,966	197,522
1941	2273	135,764	206,308
1942	6053	422,809	785,691
Northbound			
1940	1368	64,907	41,435
1941	2315	116,258	43,106
1942	7062	335,370	79,611

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"3. Extent of Proposed Service.

"The proposed service is not over a new and uncharted course where unknown navigational, meteorological and other problems might be encountered. It is, as has previously been mentioned, but one stop beyond Panagra's present terminal, involving largely an over-water operation.

"The additional mileage represents an increase, on a through operation* between Florida and the Canal Zone, of 1,150 miles (Ex. PG-4, Item 30, p. 12).** This is by no means a formidable addition for a carrier whose route miles have increased from 4,463 in 1929 to over 8,800 in 1943. As previously illustrated, *supra* pp. 9-10, the character of the proposed operation and not solely the mileage involved is important.

"The exhibits are based upon a proposed daily service, which is the same frequency as Panagra now operates on its international trunk route.

"4. Expenditure Required.

"With respect to the expense attendant upon the projected service, the exhibits show (Ex. PG-4, Item 30, pp. 12-13 and Item 34) that the total investment for equipment will amount to $835,000. In connection with this estimated expense, the following facts are significant to note:

"(1) The estimates given are of course based upon the high price level prevailing in 1943.

"(2) Some of the estimated capital expenditures (e.g., for communications equipment) might be reduced by joint facilities arrangements. (452)

"* This refers to a non-stop operation between Florida and the Canal Zone with DC-4s or other available equipment of that type. DC-4 statistics were used in the exhibits. Ex. PG-4, Item 34, page 3 states, however, that 'whatever modern and suitable type of four-motored flying equipment might be available for this operation should be used. It is believed that the corresponding operating figures would be no less favorable than those submitted herein.'"

"** Unless otherwise indicated, all statistics given relate to a terminal at Miami, Florida. Corresponding figures for Tampa will be found in the exhibits."

"(3) The relatively small amount involved is attributable to the fact that there will be fewer stations per route mile on the proposed extension than on the present operations, namely, only one in Florida, and one in Kingston (on the DC-3 operation only), with some possible additional expenditures at Balboa (1461).

"5. Financial Condition of Panagra.

"Panagra is in a strong position to undertake this estimated expenditure. Comparing the financial record of Panagra with any commercial airline in the United States, it is such, in the opinion of the President of the company, that 'there is not any airline that can match it' (798).

"As of the end of 1942 the company had cash and Government bonds of $2,592,000, total gross assets of $10,754,000 and a net worth, exclusive of good will of $3,900,000. During the ten-year period 1933 to 1942 the company capitalized the sum of $2,850,000 and built up a miscellaneous reserve of $399,000 and a self-insurance reserve of $1,201,000 (796-8; cf. Exs. G-22, G-23).

"The relatively small amount of the capital expenditure required for the permanent operation between Florida and the Canal ($835,000) is apparent when compared with these figures. Moreover, it is less than half the estimated operating revenue for one year.

"6. Estimated Revenue,
Expenses and Return Expected.

"The secure position of the company from a financial standpoint and the estimate of expected revenue from the proposed operation, demonstrate the absurdity of any argument that an order requiring the extension would be a deprivation of property in violation of the due process clause.

"The estimates of Panagra's Vice-President and Comptroller envisage an annual revenue of $1,929,500 on

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the basis of daily service with DC-4s between Miami and Balboa. The estimated annual operating expenses are $1,686,700.

"This results in an estimated operating profit, before United States mail but including revenue for the carriage of foreign mail northbound, in the amount of $242,800* (PG-4, Item 34, p. 3). Of course, the rates which Panagra would receive for carrying southbound mail (including any subsidy) will be determined by the Board. In accordance with established practice, however, such rates would be fixed at a point which would cover Federal taxes and a return on the investment, as well as any possible deficit from operations.

"These estimates of revenue to be derived by Panagra on the suggested route are supported by conservative estimates of the passenger, mail and express traffic to be carried by Panagra (49-50; Ex. PG-4, Items 16 and 20).

"As a result of the remarkable growth of Panagra during the past ten years or so, it is the opinion of the operations executives of Panagra that the company is in a better position today than ever before to add more mileage, because it is starting from a higher basis and with a larger organization, with the result that the proposed service will cause no increase in the general and burden expenses of operations (453-4; 601-2).

"7. Advantages to the Public.

"Over 75% of Panagra's passengers carried south from the Canal Zone are received from Pan American at the Canal and approximately the same percentage of those brought to the Canal northbound are transferred to Pan American's respective divisions for carriage to destinations in the United States (Ex. PG-1, Items 1 and 3).

---

*On the DC-3 operation from Miami, the estimated operating profit is $37,100. If the operation were from Tampa, instead of Miami, there would be an operating deficit of $10,200 (DC-4 operation) and $181,300 (temporary DC-3 operation)."

"Numerous advantages will accrue to these passengers from an extension of Panagra's route to a Florida terminal.

"The advantage of the speedier service on the DC-4 operation which would carry through passengers to Lima from Miami in seventeen hours is, of course, obvious. Under the proposed schedule, the Panagra plane would leave Miami at 00:00, arrive in Balboa at 7:15 and be in Lima at 17:05 (PG-4, Items 17-18).

"The manifold advantages from the point of view of passenger comfort and convenience on a through service have been abundantly developed in the record. They include:

> "(a) Fundamentally, and without stating at length the serious inadequacies of Pan American's connecting service, it would relieve the traveling public of all the disadvantages that inhere in any connecting service and would facilitate and improve the services between the United States and the eight important South American countries on Panagra's route (e.g., a number of delays in arrival are inevitable, being caused by weather, motor trouble, and other factors). Such delays are an inherent defect of a connecting service. (223) Apart from the difficulties caused by Pan American's numerous delays (Exs. P-25, P-25A, P-25B), even Panagra delays are proof of the advantages of a Panagra direct through service. (792)
>
> "(b) It would eliminate passenger discomfort and inconvenience on a night flying operation. A connecting service would require passengers to arise some time before the arrival at Balboa, and transfer from one aircraft to another, instead of continuing the trip as on a through operation, either asleep or awake, as the passengers might choose.
>
> "(c) Panagra rather than Pan American would control reservations on the Canal Zone-Florida sector, thus preventing international through passengers from being blocked out by local sector traffic (804).

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"(d) The competition provided by the extension would result in improved service generally, as illustrated by the expedition of Pan American's passenger handling at Brownsville since the advent of the competition of American Airlines on the Mexico service (400).

"In addition to these advantages to the traveling public, there would be the following advantages to Panagra itself:

"(a) A through service would make possible a *maintenance base* in the United States, nearer and more accessible to the source of supply of skilled labor and of materials and parts—providing an item of economy through the elimination of heavy inventory, rush shipments, etc. Further savings could be obtained on customs duties. It would enable the technical staff to be in closer contact with other experts in the U. S. on special problems that arise in the course of operations. (177-8)

"(b) It would assist in the procurement of skilled pilots who would be attracted by the possibility of an occasional layover in the United States (177-8).

"(c) It would make for a more economical *utilization of equipment.* (356-7)

"(d) It would result in a *generation of traffic* because of the elements of increased capacity and frequency and of competition. (440-1) The fact that transportation via Panagra could be sold on a through basis would also be helpful in the generation of traffic (399-400).

"(e) It would facilitate *freight service.* The fewer transfers of freight, the more efficient and less expensive the service becomes. Every time cargo has to be handled the package problem becomes serious and the expeditious character of the service is retarded (806)."

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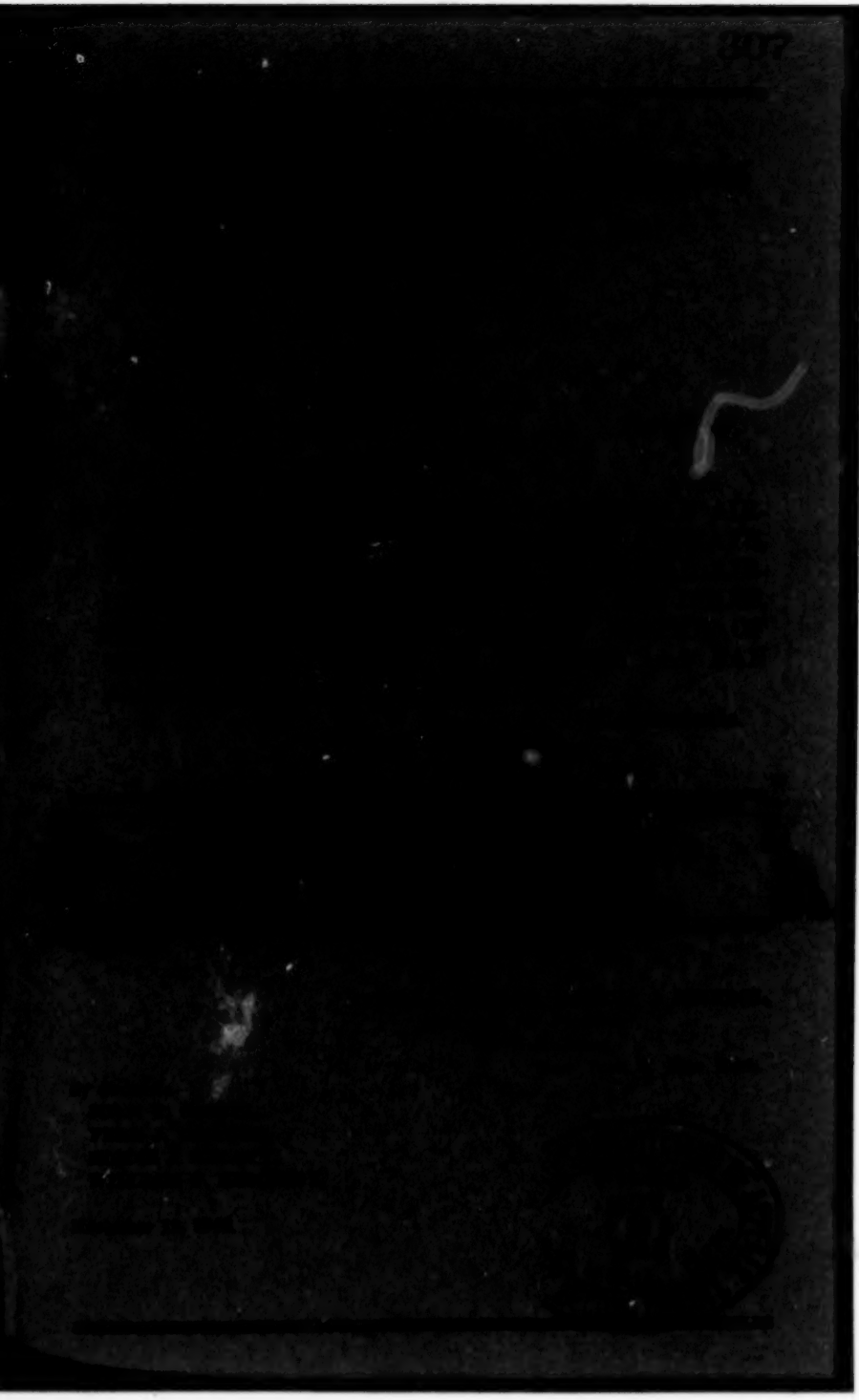

APPENDIX

Excerpt from Direct Examination of Harold J. Roig

(S. M. 754; R. 1104)

Q. Now, with that background in mind, will you tell us how Panagra's operations have been carried on by its own organization? I mean by that: have they been carried on by the Panagra organization as an independent operating entity? A. Yes, they have.

Q. In other words, Mr. Roig, is it a fair statement to make that while the ownership interests have rendered valuable service to Panagra under various headings, that Panagra has carried on its own business and run its own airline? A. Oh, yes. Panagra has had its own operating officials, it has had its own equipment, it has had its own personnel staff, its own maintenance, its own radio, everything that a self-poised independent operating airline has. It has had in addition the benefit of the services of its two parent companies, and they have performed some of the functions which, if they had not performed them, Panagra would have had to do itself, but those functions have never interfered with Panagra's independence of operation.

Excerpt from Cross Examination of Harold J. Roig by Public Counsel

(S. M. 1196-8; R. 1449-51)

Q. Well, in 1940, Panagra contributed an additional amount in the sum of about $40,000 to advertising through the Pan American advertising, did it not? A. Well, that works this way: Panagra, beginning, I think, about 1940, has done some advertising of its own.

Q. In the United States? A. In the United States. It always has advertised abroad. At or about that time we began some advertising in the United States. That advertising was paid for by Panagra. It was not included in the fee paid Pan American and was not paid for by Pan

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American. That was an additional expense incurred by Panagra.

In the preparation of that advertising we used our own organization, an outside advertising agency, and had the benefit of the assistance of Pan American's advertising department. That was strictly 100 percent Panagra advertising.

* * * * * *

Q. Now what type of advertising was this $40,000 to which I referred? A. That was magazine advertising, three-color work in full pages.

Q. System or Panagra? A. That was Panagra advertising.

Q. Itself? A. Panagra advertising. In addition to magazine advertising, newspaper advertising—Panagra ran some newspaper advertising this past year—there is also the question of folders. One of the questions that we have succeeded in arranging with the Pan American publicity department was that a certain amount of their fee should be spent in the preparation of folders, and that kind of publicity matter, related specifically to Panagra, and that has been done, and that represented definite progress.

Exhibit G-120.

(R. 5814)

May 29, 1942

Thomas A. Morgan, Esq.,
Chairman, Executive Committee,
Pan American Airways Corporation,
Chrysler Building,
New York City.

My dear Mr. Morgan,

I am informed that Pan American Airways have engaged a new advertising agency and that an advertising campaign is proposed with the general objective, in effect, of selling the idea of the efficiency and desirability of world monopoly in American foreign aviation. I understand that the last Annual Report of Pan American Airways Corporation, featuring "Pan American World Airways System", is indicative of the general theme of this campaign.

Although Pan American-Grace Airways, Inc. is an independent company with its own directors and officers, the Annual Report referred to assumes to list Pan American-Grace Airways, Inc. along with various divisions and 100% subsidiaries of the so-called Pan American Airways System. It also shows as the so-called "Executive Officers" of the "Pan American Airways System" (and that in a manner clearly intended to indicate their seniority to the officials of the divisions and companies listed as a part of this System) various individuals who are, I understand, the officers of Pan American Airways Corporation or of Pan American Airways, Inc.

We do not subscribe to the idea of world monopoly in American foreign aviation. Pan American-Grace Airways, Inc. is not a subsidiary of any "World Airways System". For these reasons as well as because of the pending proceedings before the Civil Aeronautics Board, we must re-

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quest that Pan American-Grace Airways, Inc. be not included in the proposed advertising campaign in any form implying its acquiescence in the above thesis or its being a part of any such monopoly. Moreover, we must request that all such representations of Pan American-Grace Airways, Inc.'s status as that in the above mentioned Annual Report whether in publicity, advertising, annual reports or other publications of Pan American, be discontinued as we consider such statements to be unwarranted and damaging to Pan American-Grace Airways, Inc. and to its standing as an independent company.

Very truly yours,

(Sgd.) D. S. Iglehart.

Exhibit G-159.

(R. 5925)

PAN AMERICAN-GRACE AIRWAYS

I lunched today with Richard Hoyt. We agreed that we would authorize the employment of MacGregor as Executive Vice-President of this Company at a salary of $18,000.—per year and that we would ask him as promptly as possible to lay out an organization and plan of action—this to be submitted to the Executive Committee for their modification or approval. I stated that I would like to have an opportunity of discussing it with him in case there was a failure on the part of our men to agree on a line of action.

I indicated that I hoped MacGregor would favor the naming of Jacob as one Vice-President and of Harris as another. We decided that MacGregor should be instructed to use the Grace organization in South America as far as he found it practicable to use it in the same way as he was to use the Pan American Airways in New York as far as he found it practicable to do so.

It was understood that he would say to Mr. Trippe and I would say to Mr. Patchin that it was to be understood that MacGregor was to run this business in the same way as Trippe was running the Pan American Airways, that he was to report to his Executive Committee but that all actual administrative business responsibility should be placed directly on MacGregor's shoulders and that he should be given all the prerogatives necessary to the successful carrying of this responsibility.

April 3, 1929.

D. S. I.

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[fol. 20] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 19520

W. R. GRACE & Co., Petitioner,

against

CIVIL AERONAUTICS BOARD, PAN AMERICAN AIRWAYS CORPORATION, Pan American Aiways, Inc., Eastern Air Lines, Inc., National Airlines, Inc., Chicago & Southern Air Lines, Inc., TACA, S. A., Department of Justice of the United States of America and Pan American-Grace Airways, Inc., Respondents

Appendix to Supplemental Brief of W. R. Grace & Co., Petitioner

Cahill, Gordon, Zachry & Reindel, Attorneys for Petitioner, 63 Wall Street, New York 5, New York.

Of Counsel: John T. Cahill, Fred J. Knauer, Elmer J. Kelsey, William F. Kennedy.

Filed: December 10, 1945.

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[fol. 22] APPENDIX A

BEFORE THE CIVIL AERONAUTICS BOARD, WASHINGTON, D. C.

Docket No. 707

In the Matter of the Petition and Complaint of W. R. GRACE & Co., for the Alteration, Amendment and Modification of the Certificate of Public Convenience and Necessity of Pan American-Grace Airways, Inc., so as to Name a Point Within the United States as a Terminal Thereof Pursuant to Section 401 (h) of the Civil Aeronautics Act of 1938, as Amended

Communications from the Board with respect to this Petition should be sent to the following:

A. Garni, First Vice-President, W. R. Grace & Co., 7 Hanover Square, New York City, New York; and
Whiteford, Hart & Carmody, 815 Fifteenth Street, Northwest, Washington, D. C.

[fol. 23] BEFORE THE CIVIL AERONAUTICS BOARD, WASHINGTON, D. C.

In the Matter of the Petition and Complaint of W. R. GRACE & Co., for the Alteration, Amendment and Modification of the Certificate of Public Convenience and Necessity of Pan American-Grace Airways, Inc., so as to Name a Point Within the United States as a Terminal Thereof Pursuant to Section 401 (h) of the Civil Aeronautics Act of 1938, as Amended

This petition and complaint of W. R. Grace & Co., represents to the Civil Aeronautics Board as follows:

1. The full name and address of the Petitioner is W. R. Grace & Co., 7 Hanover Square, New York, New York.

2. Petitioner, a Connecticut corporation, has been engaged in business in Latin America, particularly the countries on the West Coast of South America and Central America, for nearly a century. In 1929, jointly with Pan American Airways Corporation, hereinafter referred to as

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[fol. 24] "Pan American,"* Petitioner formed Pan American-Grace Airways, Inc., hereinafter referred to as "Panagra," and has at all times since owned 50% of the stock of Panagra, the other 50% being owned by Pan American. Petitioner (and its subsidiaries) have represented Panagra since its organization in all countries of the West Coast of South America. Petitioner is a very large user of Panagra's service for mail and passengers. Various of the officers and directors of Petitioner, who are also officers and directors of Panagra, take a direct and active part in all matters pertaining to the management and administration of Panagra's business.

3. Panagra is an air carrier within the meaning of the Civil Aeronautics Act of 1938, as amended, and at the present time holds a certificate of public convenience and necessity issued to it by the Civil Aeronautics Board, which authorizes it to engage in air transportation of persons, property and mail as follows:

> Between the terminal point Cristobal, Canal Zone, the intermediate points Cali, Colombia; Quito, Esmeraldes, Manta, Salinas, and Guayaquil, Ecuador; Talara, Chiclayo, Lima, and Arequipa, Peru; Arica, Antofagasta, and Santiago, Chile; Mendoza and Cor-Arequipa, Peru, and the terminal point Buenos Aires, Argentina, via the intermediate points Arica, Chile; La Paz, Oruro, and Uyuni, Bolivia; Salta, Tucuman, and Cordoba, Argentina, and also between the intermediate point Guayaquil and the terminal point Lojo via the intermediate point of Cuenca, Ecuador; and also between the intermediate point Oruro, Bolivia, [fol. 25] and the terminal point Corumba, Brazil, via the intermediate points Cochabamba, Sucre, Vallegrande, Santa Cruz, Concepcion, San Ignacio, San Jose, Robore, Puerto Suarez, Bolivia.

4. Panagra was incorporated under the laws of Delaware, February 21, 1929, for the purpose of engaging in

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* Pan American Airways Corporation is the parent corporation of the Pan American System, of which Pan American Airways, Inc., is the main operating subsidiary. Whenever "Pan American" is used herein, it refers to Pan American Airways Corporation or Pan American Airways, Inc., as the meaning may require.

commercial air transportation. In March, 1929, it was awarded Foreign Airmail Contract for Route No. 9 by the United States Post Office Department. It was the first American airline to operate a regular scheduled air transport service to Buenos Aires with connections to the United States. Its route runs from the Panama Canal Zone along the West Coast of South America to Arequipa, Peru, where one branch continues along the West Coast to Santiago, Chile, and thence across the Andes to Buenos Aires and the other proceeds across Bolivia and Central Argentina to the same destination. Commencing operations in Peru, by July, 1929, Panagra had extended its route to the Canal Zone on the North and to Santiago, Chile, on the South. By October 12, 1929, service had been extended over the Andes and across the Argentine to Buenos Aires. In 1935, an extension of the route from Arica, Chile, to La Paz, Bolivia, was inaugurated, thus connecting Bolivia with the international airway. In July, 1937, the route between Santiago, Chile, and Buenos Aires was diverted to include the important city of Cordoba. In April, 1937, the so-called "Diagonal Route" was instituted, being an extension from La Paz through the central portion of the Argentine to [fol. 26] Buenos Aires via Cordoba, serving en route the important cities of Salta and Tucuman, Argentina. In July, 1938, the route which had thus far been operated between Cristobal and Guayaquil over water, was diverted inland with landplane operation to serve Cali, the principal commercial city in western Colombia. In March, 1939, the route between Cali and Guayaquil was further modified to include Quito, the capital of Ecuador. In 1940 and 1941, in connection with the elimination of German services on the West Coast of South America, hereinafter referred to, Panagra has added to its route extensive local services in Ecuador, a new international service across Bolivia to the Brazilian border where it makes connection with Panair do Brasil at Corumba to provide a second South American trans-continental service and, by management agreement with Lloyd Aereo Boliviano, has assumed management responsibility for the important local services of that company in Bolivia. As a result of all this development and expansion, Panagra is at present operating about 8,000 route miles,—more route mileage than that of any domestic airline in the United States.

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5. Coincident with this expansion of its route Panagra has also, particularly during the last two or three years, greatly increased its frequencies, reduced its flying time between terminals and increased its traffic. Frequencies over the entire route, have been doubled, from two to four round trips per week. Between various points on the line there have been additional increases in frequency, schedules [fol. 27] between Buenos Aires and Santiago having been recently increased to a daily basis. In its pending rate case Panagra is seeking daily service over its entire route and believes such service to be abundantly justified by existing traffic conditions. Scheduled time for the trip between the Canal Zone and Buenos Aires, which was seven days when the service was first begun, is now a little over three days, flying time between terminals having been reduced recently by half a day on three of the four trips and by a full day on the fourth trip. Passenger traffic in the year 1941 will be almost twice what it was in 1940, which was in turn almost twice that of 1939. Panagra has become a great international trunk line providing international air service between Argentina, Chile, Brazil, Bolivia, Peru, Ecuador, Colombia, Panama (all of the countries of South America except the Guianas, Venezuela, Uruguay and Paraguay), the Canal Zone and thence via connecting service of Pan American to the United States. Public convenience and necessity indicate the next normal and logical step in this development to be an extension of this international route to a terminal in the United States.

6. Petitioner believes and therefore alleges that the public convenience and necessity require that Panagra's great international trunk line have a terminal in the United States and that therefore the certificate of public convenience and necessity which Panagra holds should be altered, amended and modified so as to make the northern terminal of Pan- [fol. 28] agra's route, as defined by said certificate, some point or place in the United States, such point or place being Miami or Tampa, Florida, or New Orleans, Louisiana, as the Board may determine to be most suitable in the public interest. Such a terminal would measurably facilitate and improve the service between the United States and the eight important South American countries on Panagra's route. It would improve efficiency of operations by making possible through routing of equipment and

crews. It would greatly facilitate freight handling in the coming development of that business which Panagra has under active study and which would be greatly handicapped by transshipment at the Canal Zone. It would enable Panagra to adopt schedules between the Canal Zone and the United States best adapted to the most satisfactory service on the Panagra Route without regard to service on other routes. It would facilitate preferential accommodations between the United States and the Canal Zone for traffic destined to and from points on the Panagra Route south of the Canal Zone. It would make possible basing of crews in the United States. It would forever free the Panagra service from dependence on a connecting carrier between the Canal Zone and the United States whose interests can never be expected to be exclusively service to the Panagra Route. It would give the Panagra Route the standing of an independent American international air line with a terminal in the United States such as every other comparable American foreign air service has and to [fol. 29] which Panagra's record and present position abundantly entitle it. By improving and strengthening Panagra's position in these respects, thereby enabling it to render service to the entire satisfaction of the countries on its route, Panagra will be enabled the better to perform its enlarged functions in the present emergency and to retain during the emergency and thereafter the position it now occupies over most of its route as the exclusive instrumentality chosen by the South American countries through which it operates to carry on international air service to and within those countries. All of this is manifestly in the national interest and required by public convenience and necessity.

7. Past experience has demonstrated the importance of these considerations to public convenience and necessity. Panagra's primary function in the public interest is to provide air transportation over its route for passengers, mail and express to and from the United States. With its terminal at the Canal Zone its service is always dependent on a connecting carrier between the Canal Zone and the United States. This inevitably restricts its freedom of action and places the efficiency of its operation to some extent beyond its control and in the hands of a connecting line with interests besides the single purpose of serving

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the Panagra Route. For some time prior to February, 1939, the connecting service provided by Pan American between Miami and the Canal Zone was not satisfactory and complaint about it was made to Pan American by [fol. 30] Petitioner and by Panagra. The matter was discussed from time to time with representatives of Pan American and on February 14, 1939, an agreement was entered into between Petitioner and Pan American Airways Corporation, the two stockholders of Panagra, whereby Pan American undertook to provide better connecting service between the Canal Zone and Miami. A copy of this agreement is attached hereto marked Exhibit "A." Subsequent to the execution of this agreement it was discussed with representatives of the Civil Aeronautics Board, but being an agreement between Pan American Airways Corporation and the Petitioner, and not between air carriers within the meaning of Section 412 of the Civil Aeronautics Act, it was not submitted for approval by the Board. This agreement even at the time of its execution was at best but a partial solution of the problem but it was hoped that it might meet the situation for a period at least. Following the execution of this agreement Pan American provided improved connecting service but such service has always been, and is now, subject to the difficulties and infirmities which obtain with respect to any connecting service, and in recent months has become increasingly inadequate. In recent months large numbers of persons wishing to travel between the United States and countries on the Panagra Route have been unable to do so owing to lack of accommodations on the connecting service between Miami and the Canal Zone provided by Pan American. No direct connecting service between [fol. 31] Miami and the Canal Zone has been provided by Pan American to connect with Panagra's fourth trip inaugurated August 26, 1941, and connection with that trip must be made by slower and more circuitous routes via Brownsville southbound and via Barranquilla northbound The contemplated service via New Orleans whether furnished by Pan American or by American Export Airlines, Inc. will not relieve the situation as the routes contemplated by both of these parties are not direct connecting services to the Canal Zone but services via Guatemala, designed primarily with a view to Central American Traffic. These services will be definitely slower and provide less accommodation for Panagra traffic than a direct service. The exist-

ing connecting service via Miami is generally late in arriving at the Canal Zone making it difficult and on many accasions impossible for Panagra to maintain its southbound schedules and Pan American is now contemplating a change in its connecting schedule which will greatly accentuate this difficulty. Panagra and Petitioner have complained to Pan American of the inadequacy of their direct connecting service in the respects above indicated and have demanded adequate direct connecting service but Pan American have failed to provide such service. Panagra has likewise been unable to obtain any clear assurances as to just what connecting services Pan American will provide for Panagra's additional trips when Panagra service is increased to a daily basis as above indicated. Petitioner alleges that the public convenience and necessity require that regardless of the reasons on which Pan American [fol. 32] may rely for not providing adequate connecting service, Panagra should be placed in position to meet the situation itself without being helpless, except by dependence on a connecting carrier, to give adequate service between the United States and the countries on the 8,000 mile Panagra Route.

8. During the past year in cooperation with the Governments of the several South American countries concerned and with various departments of the United States Government, in furtherance of hemisphere solidarity and defense, Panagra has replaced German airlines over its entire route between the Canal Zone and Buenos Aires. The German route mileage replaced by Panagra includes 590 miles in Ecuador, 670 miles in Peru, 4109 miles in Bolivia and 870 miles in Chile and Argentina. As a result of this development, the only airlines operating on the West Coast of South America are Panagra and bonafide local national lines. The importance of this accomplishment has been greatly increased with developments of the past few days bringing the West Coast of South America into an increasingly important strategic position. It is of the utmost importance in the public interest that Panagra's present position be maintained not only during the present emergency but after the termination thereof. Dissatisfaction in South America with the American air service which Panagra is able to render will make it easy for European airlines to regain in South America the position

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they have just lost. Panagra's position can only be main-
[fol. 33] tained by providing service between the countries on the Panagra Route and the United States of a kind which will justify the confidence which those countries have placed in the assurances given by the United States and in the air service provided by Panagra. Petitioner believes that this clearly involves putting Panagra's West Coast international air service on the same operating basis as Pan American's service to the East Coast of South America and on the same basis as all other comparable American foreign air services in respect of a terminal in the United States.

9. Subsequent to the execution of the agreement of February 14, 1939, Pan American applied to the Civil Aeronautics Board for a route between New Orleans and the Canal Zone (Docket No. 373). A similar application was filed with the Board by American Export Airlines, Inc. (Docket No. 497). Petitioner was granted leave to intervene in these proceedings. The report of the Examiner who heard these applications recommends the granting of the application of Pan American. The award of the New Orleans gateway to either Pan American or to American Export Airlines, Inc., would close to the Panagra Route for many years if not forever one of the last remaining important gateways to the United States from South America. Public convenience and necessity require that before this occurs Panagra take appropriate action to place its position as herein described before the Civil Aeronautics Board. Petitioner has been unsuccessful in its efforts to secure authorization from the Board of Panagra for
[fol. 34] Panagra to file an application for the New Orleans route, or for connecting service via Miami, in accordance with the Agreement of February 14, 1939, and is for that reason obliged to bring the matter before the Civil Aeronautics Board by its own motion. Petitioner has no desire to bring before the Board under existing war conditions any matter which might more appropriately be deferred to a later date and agrees with the policy expressed by the Board in its release of December 12, 1941. However, believing that the applicants may urge that considerations of national defense require immediate authorization of the New Orleans route, Petitioner feels required in the public interest to see that all facts regarding Panagra's position in the situation

are before the Board, before a decision is reached regarding the award of any additional connecting service between the United States and the Canal Zone. Furthermore, Petitioner believes that this petition is the only means by which the Board can be apprised of the importance of a terminal in the United States to the ability of Panagra to perform fully its obligations with respect to national and hemisphere defense.

10. Petitioner is prepared to submit to the Board full and complete evidence in support of the allegations made herein at a public hearing called for that purpose, and to show that Panagra is able to operate a connecting service to a terminal in the United States (subject, of course, to governmental regulations regarding equipment and personnel) and that authorization of such service will not [fol. 35] unduly prejudice any lines at present operating such connecting service. Prompt disposition of the matter will be greatly in the public interest as it will aid Panagra in the performance of its obligations in South America with respect to national interests and defense and will speed Panagra's preparations to assume additional important operations in the national interest which the future will impose upon it.

11. Petitioner has this day caused a notice of its intention to file the petition and complaint herein with the Civil Aeronautics Board to be served upon each of the scheduled air carriers whose names appear in the list of such carriers issued by the Civil Aeronautics Board on September 30, 1941, by mailing to each scheduled air carrier on the date hereof, by registered mail, postpaid and properly addressed, a copy of the notice attached hereto and made a part hereof as Exhibit "B".

Wherefore, Petitioner prays: (1) that in accordance with Section 401 (h) of the Civil Aeronautics Act of 1938, the Board, after due notice and hearing, and due finding that public convenience and necessity so require, alter, amend and modify the certificate of public convenience and necessity held by Panagra so as to make the northern terminal of Panagra's Route, as defined by said certificate, some point or place in the United States, such point or place being Miami or Tampa, Florida, or New Orleans, Louisiana, as the Board may deem to be most suitable in the public

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[fol. 36] interest; (2) that further action in Dockets Nos. 373 and No. 497, be stayed pending determination of this proceeding; and (3) that the Board take such further action in the premises as it may deem necessary or proper.

Respectfully submitted, W. R. Grace & Co., by A. Garni, First Vice-President.

Dated December 16, 1941.

[fol. 37] VERIFICATION

STATE OF NEW YORK,
County of New York, ss:

A. Garni, being duly sworn, deposes and says: That he is First Vice-President of W. R. Grace & Co., Petitioner herein; that he has read and is familiar with the contents of said Petition and Complaint; that he intends and desires that the Board, in acting pursuant to said Petition and Complaint, shall place complete and full reliance upon the accuracy of each and every statement contained therein; that he is familiar with the facts therein set forth and, to the best of his information and belief, every statement contained in the Petition and Complaint is true and no such statement is misleading.

A. Garni, First Vice-President.

Subscribed in my presence and sworn to before me by the affiant above-named this 16th day of December, 1941. Milton H. Bathrick, Notary Public.

(Notarial Stamp.)

[fol. 38] EXHIBIT "A"

1. One of the Grace directors of Panagra (who shall also be a director of Grace) will be elected President of Panagra and placed in responsible charge of the management of the Company. If at any time the Company's affairs are not being conducted to Pan American's reasonable satisfaction, then the President will resign.

2. Pan American will inaugurate on or before April 1, 1939, a second direct trip between Miami and Cristobal, and

will maintain an adequate direct connecting service between Miami, or some other U. S. port agreed upon, and Cristobal connecting with Panagra's through mail schedules. If at any time Pan American shall not comply with the foregoing, then Pan American will cause its directors on the Board of Panagra to take such action as will permit Panagra's applying to the C. A. A. for a Certificate to operate this connecting service, provided that, irrespective of any determination made as provided in paragraph 4, Pan American shall not be in any way precluded from maintaining before the C. A. A. that its service is satisfactory and should be continued and that no other service is required in the public interest. With the exception of the second direct trip between Miami and Cristobal above referred to, Pan American shall not be obliged to operate any schedules and service not designated by the Post Office Department as mail schedules but will use their best efforts to have designated as mail schedules any additional trips required to make connection with any increase in Panagra's through mail schedules.

3. It is agreeable to the parties that Pan American-Grace shall continue to utilize the respective services of Grace and Pan American and pay service fees in the same proportion as presently allowed, provided that the services to be rendered by the respective parties are satisfactory to Pan American-Grace.

4. Any disputes arising under this general plan and every phase thereof, including without limiting the generality of the foregoing, determination of "Pan American's reasonable satisfaction" referred to in paragraph 1 above and of "adequate direct connecting service" referred to in Paragraph 2 above, which cannot be settled by the Board of Panagra shall be determined by Messrs. D. S. Iglehart and C. V. Whitney. If Mr. Iglehart or Mr. Whitney shall be unable to act, or unable to agree in connection with any matter arising under the foregoing paragraphs, then, unless otherwise agreed between Grace and Pan American, such matters shall be determined by arbitration by an arbitrator [fol. 39] or arbitrators appointed by Messrs. Iglehart and Whitney, or failing such appointment, by three Arbitrators, one appointed by Grace, one by Pan American, and a third by those two, and the party adjudged in default shall, at the

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discretion of the Arbitrator, be given such reasonable time to correct the default as the Arbitrator may fix.

5. This agreement shall continue to February 1, 1944, and thereafter until cancelled by Pan American or Grace on six months' written notice.

Agreed—February 14, 1939.

W. R. Grace & Co., by (Sgd.) Harold J. Roig, Vice Pres. Pan American Airways Corporation, by (Sgd.) J. T. Trippe, Pres.

[fol. 40] Exhibit "B"

To Aero Pickup Service Corp., 3110 N. Boulevard, Richmond, Va.

Aerovias Nacionales Puerto Rico, Inc., 37 Recinto Sur St., P. O. Box 528, San Juan, Puerto Rico.

All American Aviation, Inc., 200 West 9th St., Wilmington, Del.

American Airlines, Inc., New York Municipal Airport, La Guardia Field, New York, New York.

American Export Airlines, Inc., 25 Broadway, New York, New York.

Automatic Air Mail, Inc., Lost Nation, Iowa.

Braniff Airways, Inc., Braniff Building, Oklahoma City, Okla.

Burke, Andrew J., 614 East Cook Street, Santa Maria, Calif.

Canadian Colonial Airways, Inc., New York Municipal Airport, New York, N. Y.

Caribbean-Atlantic Airlines, Inc., P. O. Box 3214, San Juan, Puerto Rico.

Catalina Air Transport, Catalina Airport, Avalon, Calif.

Chicago & Southern Air Lines, Inc., Municipal Airport, Memphis, Tenn.

Continental Air Lines, Inc., Municipal Airport, Denver, Colorado.

Delta Air Corporation, Selman Field, Monroe, Louisiana.

Eastern Air Lines, Inc., 10 Rockefeller Plaza, New York, New York.

Essair, Inc., Republic Bank Building, Dallas, Texas.

Hannaford Aircraft Co., 1604 Pioneer Bldg., St. Paul, Minn.

Inland Air Lines, Inc., Box 1811, Casper, Wyoming.

Inter-Island Airways, Ltd., Inter-Island Building, Honolulu, Hawaii.

[fol. 41] Kansas City Southern Transport Company, Inc., 114 West 11th St., Kansas City, Mo.

Marquette Airlines, Inc., Lambert St. Louis Municipal Airport, Robertson, Mo.

Mayflower Airlines, Inc., Nantucket, Mass.

Mercury Development Corp., 445 N. Pennsylvania St., Indianapolis, Ind.

Mid-Continent Airlines, Inc., Municipal Airport, Kansas City, Missouri.

National Airlines, Inc., Municipal Airport, Jacksonville, Florida.

New York and Bermudian Air Lines, 77 River Street, Hoboken, New Jersey.

Northeast Airlines, Inc., Boston Municipal Airport, East Boston, Mass.

Northwest Airlines, Inc., Holman Municipal Airport, St. Paul, Minnesota.

Oregon Airways, Inc., Administration Bldg., Swan Island Airport, Portland, Ore.

Pan American Airways, Inc., 135 E. 42nd St., New York, N. Y.

Pan American Airways Company (Delaware), 135 E. 42nd St., New York, N. Y.

Pan American-Grace Airways, Inc., 135 E. 42nd St., New York, N. Y.

Pennsylvania-Central Airlines, Corp., Allegheny County Municipal Airport, Pittsburgh, Pa.

Seaboard Airways, Inc., Seaboard Airline Railway Bldg., Norfolk, Va.

Southern Aviation Corp., 1000 American Trust Bldg., Nashville, Tenn.

Southwest Feeder Airlines, Inc., Sinclair Bldg., Ft. Worth, Texas.

Transcontinental & Western Air, Inc., 10 Richards Road, Kansas City, Missouri.

[fol. 42] Tri-State Aviation Corporation, Irwin, Pennsylvania.

United Air Lines Transport Corp., 5959 S. Cicero Avenue, Chicago, Ill.

Uraba, Medellin & Central Airways, Inc., 135 E. 42nd St., New York, N. Y.

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Waterman Airlines, Inc., Merchants National Bank Bldg., Mobile, Ala.

West Coast Airlines, Inc., 627 Insurance Bldg., Seattle, Washington.

Western Air Lines, Inc., P. O. Box 391, Burbank, California.

Wichita Falls Air Transport Company, The, Box 84, Wichita Falls, Texas.

Wiggins, E. W., Airways, Inc., P. O. Box 1089, Providence, R. I.

Wilson, Ray, Inc., Park Hill Airport, Denver, Colorado.

You and each of you, are hereby notified that W. R. Grace & Co., 7 Hanover Square, New York City, New York, is, this day, filing with the Civil Aeronautics Board a petition and complaint under Section 401(h) of the Civil Aeronautics Act of 1938, for the alteration, amendment and notification of the certificate of public convenience and necessity of Pan American-Grace Airways, Inc., so as to make the northern terminal of Pan American-Grace Airways' route, as defined by said certificate, some point or place in the United States, such point or place being Miami or Tampa, Florida, or New Orleans, Louisiana, as the Board may deem to be most suitable in the public interest.

W. R. Grace & Co., By A. Garni, First Vice-President.

December 16, 1941.

[fol. 43] APPENDIX B

[Docket 744]

W. R. Grace & Co., 7 Hanover Square, New York

April 27, 1942.

To the Civil Aeronautics Board, Washington, D. C.

DEAR SIRS:

Pan American-Grace Airways, Inc. has become one of the foremost air carriers in the world. Its route comprises not only one of the longest but also one of the strategic international air routes. As a result of compe-

tent and experienced management and operating organization, Pan American-Grace Airways, Inc., has attained a stature which not only justifies but requires its existence as a completely independent air carrier. At the present time its ability as an independent air carrier to fulfill its obligations to the public, and to the Governments of the United States and the eight South American countries which it serves, is being suppressed and its growth and development are being restricted by Pan American Airways Corporation, one of its own stockholders, in order that such developments may not interfere with Pan American's own interests and conflict with its own supposed monopoly of foreign air transportation.

Facts constituting the basis of this allegation are set forth in the memorandum submitted herewith. We stand ready to submit to the Civil Aeronautics Board such further information as may be required by it in making a full and complete investigation of the matters referred to herein.

We have long hesitated to place this matter before you, hoping that some other solution might be possible, but we have been reluctantly forced to the conclusion that there is no other way of remedying the existing situation. The urgent war needs, the need for better service, for economy of men and equipment, and for erasing the obstacles and impediments to these accomplishments, the need to extend and make more valuable and effective the great organization which Pan American-Grace Airways, Inc., has built up, and to give it full opportunity to render the service to the nation which it is highly competent to render and anx-[fol. 44] ious to perform:—these urgent needs, as well as the long-range interests of the line itself, make it impossible to leave unremedied the difficulties under which Pan American-Grace Airways, Inc. has so long labored.

We, therefore, respectfully request that the Civil Aeronautics Board require Pan American Airways Corporation to cease and desist from the matters and things complained of and require Pan American Airways Corporation to divest itself of its ownership of the stock in Pan American-Grace Airways, Inc. to such extent as may be necessary to divest itself of its present negative control of Pan American -Grace Airways, Inc., all in accordance with and as required by Section 411 of the Civil Aeronautics Act of 1938, and Sections 18 and 21 of the Clayton Act (Title 15,

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U. S. Code) and we further respectfully request that the Civil Aeronautics Board consider and grant the petition dated December 16, 1941 (Docket No. 707) and amend the Certificate of Public Convenience and Necessity of Pan American-Grace Airways, Inc. so as to name a point within the United States as a terminal of the route of Pan American-Grace Airways, Inc.

Respectfully submitted, W. R. Grace & Co., by D. S. Iglehart, President.

[fol. 45] BEFORE THE CIVIL AERONAUTICS BOARD, WASHINGTON, D. C.

STATEMENT OF FACTS IN SUPPORT OF LETTER OF W. R. GRACE & CO. TO THE CIVIL AERONAUTICS BOARD, DATED APRIL 27, 1942, RELATING TO PAN AMERICAN-GRACE AIRWAYS, INC.

Communications from the Board are to be sent to the following:

D. S. Iglehart, President, W. R. Grace & Co., 7 Hanover Square, New York City, New York, and Whiteford, Hart & Carmody, 815 Fifteenth Street, Northwest, Washington, D. C.

[fol. 46] STATEMENT OF FACTS IN SUPPORT OF LETTER OF W. R. GRACE & CO. TO THE CIVIL AERONAUTICS BOARD, DATED APRIL 27, 1942, RELATING TO PAN AMERICAN-GRACE AIRWAYS, INC.

1. W. R. Grace & Co., hereinafter referred to as "Grace", is a Connecticut corporation with its principal office at 7 Hanover Square, New York, New York. It has been engaged in business in Latin America, particularly the countries on the West Coast of South America and Central America, for nearly a century. With long experience in foreign transportation it saw very early the great future of international air transport. In 1928 it joined with Pan American Airways, Inc., hereinafter referred to as Pan

American*, in forming Peruvian Airways Corporation, which subsequently became Pan American-Grace Airways, Inc., hereinafter referred to as Panagra. Grace has at all times since owned 50% of the stock of Panagra, the other 50% being owned by Pan American. The Board of Directors of Panagra is composed of eight persons, four being nominated by Grace and four by Pan American. Grace and its subsidiaries have represented Panagra since its organization in all countries on the West Coast of South America and in this way its executives everywhere (already highly experienced in foreign transportation) have [fol. 47] gained a wide experience in foreign air transport problems and management. Various of the officers and directors of Grace who are also officers and directors of Panagra take a direct and active part in all matters pertaining to the management and administration of Panagra business. Harold J. Roig, a Vice President of Grace, has from the outset been especially active in Panagra's affairs and since 1939, when he became President of Panagra in responsible charge of its business, has devoted most of his time and efforts to Panagra.

2. Panagra is an air carrier within the meaning of the Civil Aeronautics Act of 1938, as amended, and at the present time holds a certificate of public convenience and necessity issued to it by the Civil Aeronautics Board, which authorized it to engage in air transportation of persons, property and mail, as follows:

> "Between the terminal point, Cristobal, Canal Zone, the intermediate points Cali, Colombia; Quito, Esmeraldas, Manta, Salinas, and Guayaquil, Ecuador; Talara, Chiclayo, Lima, and Arequipa, Peru; Arica, Antofagasta, and Santiago, Chile; Mendoza and Cordoba, Argentina, and the terminal point Buenos Aires, Argentina; and also between the intermediate point Arequipa, Peru, and the terminal point Buenos Aires,

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Argentina, via the intermediate points Arica, Chile; La Paz, Oruro, and Uyuni, Bolivia; Salta, Tucuman and Cordoba, Argentina, and also between the intermediate point Guayaquil and the terminal point Lojo via the intermediate point Cuenca, Ecuador; and also between the intermediate point Oruro, Bolivia, and the terminal point Corumba, Brazil, via the intermediate points Cochabamba, Sucre, Vallegrande, Santa Cruz, Concepcion, San Ignacio, San Jose, Robore, Pureto Suarez, Bolivia."

[fol. 48] 3. Panagra was incorporated under the laws of Delaware on February 21, 1929, for the purpose of engaging in commercial air transportation. In March, 1929, it was awarded Foreign Airmail Contract for Route No. 9 by the United States Post Office Department. It was the first American airline to operate a regular scheduled air transport service from Buenos Aires with connections to the United States. Its present route runs from the Panama Canal Zone along the West Coast of South America to Arequipa, Peru, where one branch continues along the Coast to Santiago, Chile, and thence across the Andes to Buenos Aires. The other branch proceeds across Bolivia to Oruro where it again divides into one branch proceeding across Bolivia to Corumba, Brazil, and the other through central Argentina to Buenos Aires. Commencing operations in Peru in 1929, by July of that year Panagra had extended its route to the Canal Zone on the North and to Santiago, Chile, on the South. By October of that year service had been extended over the Andes and across the Argentine to Buenos Aires. In 1935, an extension of the route from Arica, Chile, to La Paz, Bolivia, was inaugurated, thus connecting Bolivia with the international airway. In July, 1937, the route between Santiago, Chile, and Buenos Aires was diverted to include the important city of Cordoba. In April, 1937, the so-called "Diagonal Route" was instituted, being an extension from La Paz through the central portion of the Argentine to Buenos Aires via Cordoba, serving en route the important cities of Salta and Tucuman, Argentina. In July, 1938, the [fol. 49] route which had thus far been operated between Cristobal and Guayaquil over water, was diverted inland with landplane operation to serve Cali, the principal commercial city in western Columbia. In March, 1939, the route

between Cali and Guayaquil was further modified to include Quito, the capital of Ecuador. In 1940 and 1941, in connection with the elimination of German services on the West Coast of South America, Panagra has added to its route extensive local services in Ecuador, a new international service across Bolivia to the Brazilian border where it makes connection with Panair do Brazil at Corumba to provide a second South American Transcontinental service and, by management agreement with Lloyd Arreo Boliviano, has assumed management responsibility for the important local services of that company in Bolivia. As a result of all this development and expansion, Panagra is at present operating about 8,000 route miles,—more route mileage than that of any domestic airline in the United States.

4. Coincident with this expansion of its route Panagra has also, particularly during the last two or three years, greatly increased its frequencies, reduced its flying time between terminals and increased its traffic. Frequencies over the entire route have been increased from two to five round trips per week and steps are now being taken to increase this to daily service. Between various points on the line there have already been additional increases in frequency, schedules between Buenos Aires and San- [fol. 50] tiago having been recently increased to a daily basis. Scheduled time for the trip between the Canal Zone and Buenos Aires, which was seven days when the service was first begun, is now three days, flying time between terminals having been reduced recently by half a day. Passenger traffic has been increasing about 100% per year during the past several years. Thus Panagra has become a great international trunk line providing international air service between Argentina, Chile, Brazil, Bolivia, Peru, Ecuador, Columbia, Panama (all of the countries of South America except the Guianas, Venezuela, Uruguay and Paraguay), the Canal Zone and thence via connecting services of Pan American to the United States.

5. A considerable part of the expansion of Panagra's route has been accomplished at the insistence of Grace and in the face of Pan American's opposition. Soon after the organization of Panagra in 1929, it developed that Grace and Pan American entertained basically different philosophies regarding Panagra's status and destiny and

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this difference of view has continued. Grace has at all times maintained the view that Panagra, while availing itself of the facilities and experience provided by both Grace and Pan American, should be an independent entity free to operate, develop and expand as its own welfare and the public interest might dictate and that its policies, organization and operations should be conducted independently and free of any adverse domination by either of its stockholders. With this in view Grace, while placing at [fol. 51] the disposal of Panagra the services and experience of its ranking officials and of its extensive organization in South America, as well as in the United States, has always taken the position that Panagra's affairs should be administered and decisions regarding its policy, management and daily operations taken solely with reference to the best interests of Panagra and the public interest which it is Panagra's duty to serve, and without reference to opposing collateral or related interests of Grace or of Pan American or of any part of Grace's or Pan American's organizations. Pan American, on the other hand, has consistently maintained that Panagra should be administered primarily as a part of the so-called Pan American Airways System, that it should be held out to the public as a subordinate part of such system rather than as an independent entity and that its policies and affairs should be determined and administered and its destiny controlled by what Pan American might from time to time deem to be in the best interests of itself and the Pan American Airways System, and in accordance with the broad general view which Pan American has always maintained that all American international air transportation should be in the hands and control of the Pan American Airways System. In pursuance of this policy, and despite efforts of Grace and of the Panagra management to the contrary, Pan American has in its publicity, advertising, financial reports, published schedules and timetables, public interviews and comments of its officials, as well as in its official conduct in such matters [fol. 52] as those hereafter referred to, repeatedly and consistently sought to subordinate Panagra's position as an independent entity and to establish the position that Panagra is not an independent company but merely a subordinate part of the Pan American Airways System, controlled by Pan American Airways Corporation. Simi-

larly, in pursuance of this policy, Pan American, although in its own activities an outstanding example of expansion, has resisted much of the expension and development of the Panagra Route as above described. For example, Pan American opposed Panagra's overland route across Columbia via Cali. Pan American delayed approval of Panagra's extension into Bolivia to such an extent that Grace was iteslf obliged, in order to prevent its falling into the hands of a German controlled company, to acquire the concession from the Bolivian Government in its own name. Grace subsequently turned over this concession to Panagra without payment. Over a period of years and even now, when the public interest and the national defense so urgently require it, Pan American is preventing any application by Panagra for an extension of its route to any terminal in the United States.

6. The so-called "Camaguey stop" incident is illustrative of the precariousness of Panagra's position as an independent air carrier when its interests come into conflict with Pan American's. On November 25, 1941, Pan American filed an application (Docket No. 689) with the Civil Aeronautics Board for authorization to include [fol. 53] Camaguey, Cuba, as an intermediate stop on its route between Miami and the Canal Zone. The Camaguey stop while in itself desirable, would, by reason of the additional mileage and ground time, under then existing schedules have so increased the flying time between Miami and the Canal Zone as to destroy the existing connection with Panagra at the Canal Zone and greatly increase the flight time from the United States to points on the West Coast of South America, as well as to Buenos Aires. The President of Panagra, both before and after the filing of this application, directed the attention of Pan American to the adverse *affect* upon Panagra which the approval of this application would have. While these discussions were being held, Pan American, without prior notification of any kind to Panagra, filed with the Civil Aeronautics Board on December 3, 1941, a request for an Exemption Order which would have the effect of permitting the immediate inclusion of Camaguey without the notice and hearing required by the Act. Pan American in making this request omitted to notify the Civil Aeronautics Board in any way of Panagra's interest and concern in the matter and in its

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letter to the Board requesting this Exemption Order stated:

> "To the best of the applicant's information and belief, no air transportation enterprise other than applicant's Cuban subsidiary, which conducts operations to and from Camaguey, has any interest in the rendition of service to that point by the applicant."

On December 12, 1941, the President of Panagra filed, on behalf of Panagra, with the Civil Aeronautics Board a petition of intervention in Docket No. 689, so that when-
[fol. 54] ever the Camaguey proceeding was set down for hearing, or otherwise became active, Panagra's interests would be represented and protected. At that time he had no knowledge of the fact that an exemption request had already been filed by Pan American and had, in fact, already been granted by the Civil Aeronautics Board on the previous day. (Order Serial No. 1434.) Immediately the fact that the Exemption Order had been issued became known to him, he requested an opportunity to appear before the Civil Aeronautics Board in order to present the entire situation. This opportunity was granted and on December 15, 1941, the President of Panagra informed the Civil Aeronautics Board that Panagra was vitally interested in the matter, and that Panagra had had no knowledge of the exemption request. He requested that the Exemption Order be modified so as to postpone the inauguration of service to Camaguey until the stop could be made by Pan American without prejudice to Panagra's service and schedules. This request was granted by the Board and incorporated in an amended Order issued December 16, 1941. (Order Serial No. 1443.)

The President of Panagra had filed the petition of intervention with the Civil Aeronautics Board without seeking authorization from the Board of Directors of Panagra, because he had reason to believe that such authorization could not be secured as the Pan American directors on the Panagra Board would not approve it. At or before the above hearing, Pan American submitted to the Civil Aero-
[fol. 55] nautics Board a letter in which, referring to the action by the President of Panagra in intervening in the proceeding, it is stated:

> "We do not propose to question his authority to do so, although we are entirely aware of the fact he is

acting without authorization from his Board of Directors."

The object of this statement was perhaps to cast doubt upon the validity of the action taken by the President of Panagra, possibly to quash Panagra's intervention on that ground without regard to the merits. At best it is a clear warning that Panagra can only act with Pan American's acquiescence even in self defense. The statement leaves no doubt as to the position in which Panagra finds itself with regard to its connecting service between the Canal Zone and the United States. Panagra can not even protect this connecting service on which its life is so vitally dependent except by the acquiescence of Pan American which provides that connecting service. Panagra is utterly dependent on the favor of Pan American, its own hands legally tied whenever Pan American wishes to tie them, in any matter where its interests are contrary to those of Pan American.

7. Conclusively demonstrative of the situation complained of is the record of Grace's efforts to have Panagra bring its line through from the Canal Zone to a terminal in the United States. For several years Grace has felt that an extension of Panagra's Route beyond the Canal Zone to a terminal in the United States would be a normal, logical and necessary step in Panagra's development and would be in the public [fol. 56] interest. Such an extension would measurably facilitate and improve the services between the United States and the eight important South American countries on Panagra's route. It would substantially improve efficiency and economy of operations by making possible through routing of equipment and crews, thus improving utilization of equipment and reducing time lost by crews. It would enable Panagra to establish schedules between the Canal Zone and the United States best adapted to the most satisfactory service on Panagra's route without regard to service on other routes operated by a competitor. It would facilitate preferential accommodations between the United States and the Canal Zone for traffic destined to and from points on Panagra's route south of the Canal Zone. It would make possible the basing of crews in the United States. It would greatly facilitate freight handling in the coming development of that business, which

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Panagra has under active study, and which would be greatly handicapped by transshipment at the Canal Zone. It would forever free Panagra from dependence on Pan American for a connecting service between the Canal Zone and the United States. It would put Panagra's West Coast service on the same operating basis as Pan American's East Coast service. It would give Panagra's route the standing of an independent American international airline with a terminal in the United States such as every other comparable American foreign air service has and to which Panagra's record and present position abundantly entitle it.

[fol. 57] 8. Experience has demonstrated the importance of the considerations mentioned in the foregoing paragraph. Panagra's primary function is to provide air transportation for passengers, mail and express between the United States and the eight South American countries which it serves. With its northern terminal at the Canal Zone, Panagra's service is now and always has been dependent upon its 50% stockholder, Pan American, for connecting service between the Canal Zone and the United States and any inadequacy or failure of that service or any change or modification in it by way of schedule changes, service to additional intermediate points, or otherwise, has its effect upon the service which Panagra can render over its route. Problems of this character have arisen on a number of occasions. Because of Pan American's 50% ownership of Panagra, the latter cannot act in such matters except with Pan American's approval. Panagra's resulting utter dependence upon Pan American with respect to connecting service inevitably restricts Panagra's freedom of action and places the efficiency of its operation to a large extent beyond its control and in the hands of a connecting carrier possessing other interests than the single purpose of serving Panagra's route. This obviously places Panagra in a weak and definitely inferior position to Pan American with respect to this competitive service of Panagra and Pan American between the United States and Buenos Aires. At the present time, to maintain competitive schedules between the [fol. 58] United States and Buenos Aires equal to or faster than those operated by Pan American, Panagra must rely completely upon the adequacy of connections provided at the Canal Zone by Pan American and over which Panagra has no control whatsoever. Recent developments and the

requirements of national defense indicate conclusively that the continuation of Panagra's dependence upon Pan American for an outlet to the United States is not in the public interest and should be eliminated and Panagra placed in a position of complete independence with respect to the development of the international air service which it seeks to perform.

9. Grace has repeatedly urged upon Pan American and its directors on the Panagra board that because of the foregoing considerations Panagra should make application to the Civil Aeronautics Board for an extension of its route to a terminal in the United States. Pan American has consistently refused to permit Panagra to file such an application. Early in 1940, when Pan American (Docket No. 373) and American Export Airlines, Inc. (Docket No. 497) applied for the route between New Orleans and the Canal Zone, Grace again endeavored to persuade Pan American to permit Panagra to apply for this connecting route. It was apparent that the award of the New Orleans gateway to either Pan American or American Export Airlines, Inc. might foreclose Panagra from entering any important gateway from South America into the United States. Grace and the Grace directors on the Panagra Board accordingly urged upon Pan American that it should [fol. 59] not permit Panagra's service to be prejudiced by this development but that it should permit the Pan American directors on the Panagra Board to vote to authorize Panagra to apply for the New Orleans route. All of these efforts were unsuccessful. While these discussions were taking place, the applications of Pan American and American Export Airlines, Inc., above referred to, came on for hearing and in order to protect its interests and those of Panagra pending further negotiation with Pan American, Grace filed an application to intervene in said proceeding which was granted by the Civil Aeronautics Board. Further efforts to persuade Pan American to permit Panagra to apply for the route met with no success. The President of Panagra called various special meetings of the board of directors of Panagra to consider the matter and to authorize action to protect Panagra's position but the Pan American directors of Panagra, constituting one-half of the board, repeatedly failed and declined to attend such directors' meetings and adjournments thereof, thus mak-

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ing action by the Panagra board of directors impossible. Pan American itself failed to attend a stockholders' meeting of Panagra called at its request for the purpose of considering the matter, thus rendering impossible any action by the stockholders. Such action and conduct on the part of Pan American and its directors on the Panagra Board was intended and had the effect, by negative control, of preventing Panagra from taking any action whatever toward securing an extension of its services believed to be required in the public interest. Such action and con- [fol. 60] duct prevented Panagra from even submitting to the Civil Aeronautics Board for consideration the wisdom and public convenience and necessity of any such extension. Pan American considered any such extension to be competitive with its existing service between Miami and the Canal Zone and between Brownsville and the Canal Zone, as well as with its prospective service between New Orleans and the Canal Zone and accordingly exercised its 50% stock interest in Panagra in such a manner as to frustrate any possible adverse competitive result. Action by Panagra being thus rendered impossible, Grace on December 16, 1941 (Docket No. 707), itself filed an application, pursuant to Section 401(h) of the Civil Aeronautics Act of 1938, for the alteration, amendment and modification of the certificate of public convenience and necessity of Panagra, so as to name a point within the United States as a terminal of Panagra's route. Reference is made to said application for further facts bearing on this matter. Said application is still pending before the Board. Pan American has filed no answer to said petition but has not changed its previous position since the petition was filed.

10. While conditions such as those above referred to may perhaps be suffered in time of peace, they are intolerable in time of war when the national interest demands that every instrumentality of defense such as an airline in foreign service be free to function to maximum efficiency unhampered by impediments of the character [fol. 61] referred to. The situation described does not interfere with the efficient management and administration of Panagra's day to day business, but it has interfered and under existing war conditions will interfere to an increasing degree with the formulation and realization of important policies affecting the present and future welfare

of Panagra, and the public service it is able to render, whenever such policies come into conflict with Pan American's present and proposed activities or ambitions. Considerations of national defense require prompt disposition of the questions involved. The public interest and the interests of national defense demand that Panagra be a free and independent air carrier in position to maintain its relations with the public and with the United States Government as an independent entity. It should have an independent standing in the minds of the public and an independent name which will give it that standing, a name under which it can assume full responsibility for its own conduct and avoid criticism for conduct over which it has no control. Its stock ownership and the constitution of its board of directors should be such that it will be in a legal position where it can act in all matters in accordance with the public interest and its own welfare without reference to the desires, interests or aspirations of any other air carrier and where it can present to the Civil Aeronautics Board for its determination, as provided by the Act, matters involving its interests and the public interest without having [fol. 62] its hands tied by the interest of any other air carrier. The war emergency has imposed greatly added burdens and responsibilities on Panagra as an air carrier operating in eight South American countries. Panagra has, in furtherance of national defense, taken over German operations in various parts of South America, has increased its route mileage and augmented its frequencies and will undoubtedly be called upon for further expansion of this character. The present emergency is creating many rapid changes in the international air map and in the duties and responsibilities placed upon United States air carriers engaged in foreign air transportation. The complete withdrawal of American passenger steamship service between the United States and the South American countries served by Panagra, places the burden upon Panagra of maintaining vital communication between the countries on its route and between them and the United States, so essential for defense and hemispheric solidarity. The effectiveness of Panagra's service in the national defense is necessarily prejudiced by the power of Pan American through the exercise of its negative control of Panagra to tie Panagra's hands and prevent it from taking any action whatsoever, even to sub-

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mitting the matter to the Civil Aeronautics Board, which Pan American may deem adverse to its own interests. Even now, while Panagra is precluded by Pan American from proceeding in its own behalf to request authorization from the Civil Aeronautics Board to institute through service to the United States, various events are occurring [fol. 63] which constitute actual and potential inroads and threats to the territory pioneered and developed by Panagra. Other air carriers are extending, or are about to extend their operations into Mexico, Central America and the Caribbean area. What steps these carriers will take to extend their services further and into the territory served by Panagra has not as yet been fully revealed. Pan American itself, while barring Panagra from applying for any service between the Canal Zone and the United States, is rapidly expanding its own services in this area and may at any time press for early inauguration of its proposed service over the New Orleans-Canal Zone route. The present situation whereby Panagra, solely as the result of the exercise of Pan American's negative control of its actions, must stand by helpless and watch other air carriers moving into and strengthening their position in an area where Panagra should be operating to complete its own service, is prejudicial to the interests of Panagra, to the public interest and to the national defense.

Respectfully submitted, W. R. Grace & Co., by D. S. Iglehart, President.

Dated April 27, 1942.

[fol. 64] VERIFICATION

STATE OF NEW YORK,
County of New York, ss:

D. S. Iglehart, being duly sworn, deposes and says: That he is President of W. R. Grace & Co.; that he has read and is familiar with the contents of the foregoing Statement of Facts; that he intends and desires that the Board shall place complete and full reliance upon the accuracy of each and every statement contained therein; that he is familiar with the facts therein set forth and, to the best of his in-

formation and belief, every statement contained in said Statement of Facts is true and no such statement is misleading.

D. S. Iglehart, President.

(Notarial Signature and Stamp.)

[fol. 65] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 19520

W. R. GRACE & Co., Petitioner,

against

CIVIL AERONAUTICS BOARD, PAN AMERICAN AIRWAYS CORPORATION, Pan American Airways, Inc., Eastern Air Lines, Inc., National Airlines, Inc., Chicago & Southern Air Lines, Inc., Taca, S. A. Department of Justice of the United States of America and Pan American-Grace Airways Inc. Respondents.

APPENDIX TO
SUPPLEMENTAL BRIEF OF RESPONDENT PAN AMERICAN AIRWAYS CORPORATION

Root, Clark, Buckner & Ballantine, Attorneys for Pan American Airways Corporation, 31 Nassau Street, New York 5, N. Y.

Henry J. Friendly, James P. Kranz, Jr., John P. Apicella, of Counsel.

Dated and Filed: December 10, 1945.

[fol. 66] APPENDIX

Excerpts from Pre-Hearing Conference Reports

From Pages 2-3 of Pre-Hearing Conference Report Served December 31, 1942 (R. 199-200):

In order to assist the parties in reaching an agreement as to the contentions involved in this proceeding the

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Examiners stated that the following appeared to be the outstanding issues:

I. Does the Board have the power to order the extension of an existing certificate by amendment when no application has been filed?

II. Does the public convenience and necessity require extension of Panagra's route to the United States?

1. Public convenience and necessity
   (a) Is there need for additional service?
   (b) Who shall operate such service?
   (c) Where shall it terminate?
      1. Miami
      2. Tampa
      3. St. Petersburg

2. Public interest under section 408.

The Examiners made it clear that this proceeding would be restricted to a consideration of the issues arising under section 401 in connection with the inauguration of additional air service between the Canal Zone and Florida, and that they would not allow the introduction of testimony and exhibits that are solely related to the Board's investigation in Docket No. 744.

Public Counsel stated that in his opinion some of the factual background and history of Panagra relevant to the investigation in Docket No. 744 must be considered in this proceeding. He believes that the family difficulties [fol. 67] within the Panagra corporation are pertinent to the question of the carrier to be selected. In this connection it appears to him that the family quarrel is a factor to be considered in determining whether Panagra is fit and able to extend its present route into the United States.

Public Counsel would supplement the issues set forth by the Examiners by: (1) pointing out that willingness is a legal issue, and (2) that fitness and ability is an issue as to who should be selected to serve between the Canal Zone and the United States, either Panagra or some other carrier.

From page 1 of Supplemental Pre-Hearing Conference Report Served January 20, 1943 (R. 240):

After consideration of the exceptions and the further agreements the Examiners have determined that the pre-hearing conference report served December 31 should be supplemented in the following particulars:

1. Page 2—The second paragraph on this page is expanded to show that Public Counsel is of the opinion that some of the material relevant to the investigation in Docket No. 774 may be considered in this proceeding and is relevant for three reasons:

1. On the issue of fitness and ability of Panagra.
2. On the issue of the selection of a carrier.
3. As rebuttal to material on the question of public interest under section 408.

[fol. 68] Excerpts From Transcript of Hearings Before Examiners

S. M.* 3, line 1 to line 9, inclusive (R.* 341):

Examiner Brown: The Civil Aeronautics Board has assigned this time and place for a hearing in Docket No. 779, in the matter of alteration, amendment and modification of the certificate of public convenience and necessity of Pan American-Grace Airways, Inc., under Section 401 (h) ** of the Civil Aeronautics Act of 1938, as amended, to provide for a route terminal in the United States.

S. M. 10, Line 29, to S. M. 13, line 14, inclusive (R. 348-51):

Mr. Wiprud: May I make a brief statement for the Department of Justice at this time?

Examiner Brown: Yes.

Mr. Wiprud: I am not addressing myself to this motion, because I think the question raised in this motion is one

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* S. M. refers to the stenographic minutes of the hearings before the Examiners; R. refers to the pages of the record filed with this Court as renumbered by the Civil Aeronautics Board.

** Erroneously recorded in the stenographic minutes as 401 (b).

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that the Department is not directly concerned with. However there is a question that has bothered the Department a great deal, and which I would like to state to the Board at this time.

The Department intervened in this proceeding because of the charges of restraint and attempted monopoly in the related complaint proceeding, Docket 744. As we stated in our petition, participation by the Department of Justice [fol. 69] in these proceedings is in furtherance of the anti-monopoly policy of Congress as expressed in the Civil Aeronautics Act which this Board administrates, and the Federal anti-trust laws which the Department must enforce.

The very strong allegations of restraint and attempted monopoly set forth by both parties which have been filed with the Department as well as with the Civil Aeronautics Board require, because of the jurisdictional question raised in Docket No. 744, that the related activities of the Department of Justice as well as the Civil Aeronautics Board in this matter be coordinated.

The situation then seems to be this: Docket No. 744 involves a complaint seeking divestiture of stock ownership in Pan American-Grace Airways, and Docket No. 779 concerns authority for that company to extend its operations from the Canal Zone to continental United States. The complaint case then raised the question of ownership of Pan American-Grace Airways. Certainly if the allegations of either party or both parties are sustained, there may be a very material change in ownership. Pan American's ownership may be in all or in part divested, or both, in order to remove the alleged restraint or attempted monopoly in this field.

In this situation it seems to us that the proper finding on the issue of the fitness, ability, and willingness of Pan American-Grace Airways to conduct the proposed new operations, as well as the important public issue of restraint and monopoly may well depend upon the determination of [fol. 70] the issue of ownership. Indeed, the position of the Department in the certificate case will largely depend upon the decision made on the issue of ownership.

Furthermore, if the Board should decide that it is without jurisdiction in the complaint case, the subject matter of that case then falls within the jurisdiction of the Department of Justice under the Sherman Anti-Trust Act.

Whether the Board retains jurisdiction to determine the complaint case, or whether it concludes that it has not jurisdiction and refers the issue to the Department of Justice, the fact remains that the ownership case should precede the certificate case.

The Department, therefore, respectfully suggests that the Board first decide whether it has jurisdiction in the complaint case. If the Board decides it has no jurisdiction in the complaint case, the Department, for the reason stated, may wish to ask for a postponement of the hearing on the certificate case, or at least that it should not be closed until the issue as to ownership has been decided in some other forum.

Examiner Brown: You are not making a formal motion in that respect at this time?

Mr. Wiprud: No, Mr. Examiner. The Department merely wishes to express its views in this matter at this time. In the event that the matter becomes primarily the concern of the Department of Justice, as I stated, the Department may wish to ask that the Board continue this case, or at least not close it until the ownership question is determine-.

[fol. 71] [Cross-Examination of Harold J. Roig]

S. M. 1009, line 2 to S. M. 1011, line 22, inclusive (R. 1362-64):

By Mr. Friendly:

Q. Are you familiar with the letter of W. R. Grace & Company to the Civil Aeronautics Board dated April 27, 1942, and the document entitled "Statement of Facts" in support thereof?

Mr. Friendly: For the sake of the record, let it appear that the letter is signed by Mr. D. S. Iglehart and the statement verified by him.

Examiner Brown: And those documents are filed, are they not, in Docket 707?

Mr. Friendly: 744.

Examiner Brown: 744?

Mr. Friendly: Yes.

Examiner Brown: Of course, I don't need to remind you, Mr. Friendly, that this proceeding does not involve Docket 744.

Mr. Friendly: I know. I have only one or two questions.

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A. Yes, I have seen the letter. It refers to——

Mr. Cahill: I don't want testimony about its contents, because I intend to object to its contents.

By Mr. Friendly:

Q. Did you participate in the formulation of the Statement of Facts in any way?

Mr. Cahill: I will make my objection now on the grounds that they are immaterial and irrelevant, and not within the issues before us.

[fol. 72] Examiner Brown: I will hear you, Mr. Friendly, on that.

Mr. Friendly: I think until I have asked questions I can't argue on this in general.

Mr. Cahill: Do you want to ask just one more foundation question?

Mr. Friendly: Well, I just wanted to ask whether he participated in the formulation.

Mr. Cahill: Go ahead.

A. Yes.

By Mr. Friendly:

Q. I call your attention to the statement on page 12 of the Statement of Facts and next to the letter reads as follows: "The public interest and the interests of national defense demand that Panagra be a free and independent air carrier in position to maintain its relations with the public and with the United States Government as an independent entity. It should have an independent standing in the minds of the public and an independent name which will give it that standing, a name under which it can assume full responsibility for its own conduct and avoid criticism for conduct over which it has no control."

The Witness: Shall——

Mr. Friendly: I want to ask some questions about that statement and if Mr. Cahill likes to make his objection now, I think we can see the point.

Mr. Cahill: I want to object now on the ground that it [fol. 73] is immaterial and irrelevant, and it is an issue in Docket 744.

Mr. Reynolds: Mr. Examiner, I think Mr. Friendly is perfectly free to go into this or any other statement made outside of this proceeding by Mr. Roig or any——

Examiner Brown: This is not made by Mr. Roig.

Mr. Cahill: This is not made by Mr. Roig.

Mr. Reynolds: He testified he participated in the preparation of the letter.

Examiner Brown: Is that correct, Mr. Roig?

The Witness: That is correct.

Mr. Reynolds: And he is entitled to go into that in line with Mr. Roig's previous answer to the effect that it would be in his judgment good business to have this line as so constituted extended to the United States.

Mr. Gambrell: Furthermore, Mr. Examiner, on page 6 of the reply of W. R. Grace & Company that company makes reference to both dockets, 707 and 744 and what is set out and to Grace's intention to elaborate on it at the hearing.

Examiner Brown: Of course, you realize that those are merely pleadings in this case and this is an investigation by the Board looking into the possibility of an extension of Panagra to the United States. However, I will let Mr. Friendly proceed with the question.

Mr. Cahill may enter his exception.

[fol. 74] S. M. 1014, line 15, to S. M. 1015, line 22, inclusive, (R. 1367-68):

Mr. Friendly: I am going to ask that the letter and statement of facts be incorporated in this record. If there is any technical objection to that, I will have it prepared as an exhibit.

Mr. Cahill: I raise no technical objection. I raise the substantial objection that it is a separate proceeding, it has been so set up, and the proceedings have not been consolidated, and I take it that those are the remedies that should be employed if such cross referencing is to be had.

Mr. Friendly: I think it shows a decided inconsistency in the position of W. R. Grace & Company in spite of Mr. Roig's explanation.

Mr. Cahill: That is a matter of argument.

Mr. Friendly: It is a matter of argument, of course, but the data for the argument should be in the record.

Examiner Brown: Of course, this is a matter on file with the Board to which it may make reference, and I see no reason for incorporating it in this case. It is a public

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document, a formal document before the Board, in which a certain position has been taken and if argument is necessary, if it is desirable to argue on it, it seems to me you can argue from the other document as well as incorporating it in this record.

Mr. Friendly: It seems to me, Mr. Examiner, if this were a letter written by Mr. Iglehart to anyone——

Examiner Brown: You would have a different situation. [fol. 75] Mr. Friendly: ——we would have a right to put it in. The fact that it is written to the Civil Aeronautics Board doesn't make it any less admissible.

Examiner Brown: I am not quarreling as to the admissibility. I am merely saying that the Board can take cognizance of it just as well on its file as it can——

Mr. Friendly: If your ruling is that we may refer to it in brief and argument——

Examiner Brown: That is the ruling.

[fol. 76] ECONOMIC REGULATIONS PROMULGATED BY CIVIL AERONAUTICS BOARD

Section 285.10

Conference Procedure

In any proceeding, the examiner designated to conduct the hearing, or any other person designated by the Chief Examiner or by the Board for the purposes of this rule, may direct counsel for the parties to such proceeding to appear before him for a conference to consider the following:

(a) The formulation of the issues to be considered at the hearing by:

(1) Agreement of the parties,

(2) Amendment of the application, complaint, or petition,

(3) Any other appropriate means;

(b) The simplification of proof by:

(1) Stipulations concerning matters of which the Board can take notice, the admission in evidence of particular facts or documents, or any other appropriate matter,

(2) Limitation of the number of witnesses,

(3) The preparation of exhibits, and the use thereof in lieu of oral testimony whenever possible,

(4) Any other appropriate means;

(c) The exchange prior to the date of the hearing of exhibits proposed to be introduced therein and any other material which will expedite the conduct of the same;

(d) Such other matters as may, in the opinion of the person conducting the conference, aid in the conduct and disposition of the proceeding.

Notice of the time and place of the conference shall be given by letter or otherwise to all parties to the proceeding. [fol. 77] The person conducting the conference may require the exchange of particular exhibits in advance of the date set for the hearing, and if any exhibits are not exchanged in advance as required, or as agreed upon by counsel at the conference, the hearing shall be subject to postponement until such exchange is completed.

The person conducting the conference shall prepare a report of the same, which shall be served upon counsel for all of the parties and made of record. Counsel may object to the description of anything which occurred at the conference within five days after the receipt of the report, and such report may, in the discretion of the person preparing the same, be revised in accordance therewith. If revised, the report shall again be served upon counsel and made of record in the same manner as the original report. Exceptions may be taken on the basis of any written objection submitted within the time prescribed which has not been met by a revision of the report. Such report shall constitute the official account of all that transpired at the conference, and shall control the subsequent course of the proceeding, but it may be reconsidered and modified at any time to prevent injustice.

[fol. 78] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1945

No. 92

(Argued November 12, 1945. Decided January 28, 1946)

Docket No. 19520

W. R. GRACE & Co., Petitioner,

v.

CIVIL AERONAUTICS BOARD, PAN AMERICAN AIRWAYS CORPORATION, Pan American Airways, Inc., Eastern Air Lines, Inc., National Airlines, Inc., Chicago & Southern Air Lines, Inc., TACA, S. A., Department of Justice of the United States of America and Pan American-Grace Airways, Inc., Respondents

Before L. Hand, Swan and Frank, Circuit Judges

Petition to Review Orders of the Civil Aeronautics Board. Remanded

Cahill, Gordon, Zachry & Reindel (John T. Cahill, Fred J. Knauer, Elmer J. Kelsey and William F. Kennedy, of counsel) for Petitioner.

[fol. 79] Wendell Berge and George C. Neal (James E. Kilday, Lawrence S. Apsey, Edward Dumbauld, John H. Wanner and Louis W. Goodkind, of counsel) for Civil Aeronautics Board.

Root, Clark, Buckner & Ballantine (Henry J. Friendly, James P. Kranz, Jr., and John P. Apicella, of counsel for Pan American Airways Corporation.

Gambrell & White (E. Smythe Gambrell, W. Glen Harlan and Harold L. Russell, of counsel) for Eastern Air Lines, Inc.

W. R. Grace (Grace) has filed a petition in this court to review orders made by the Civil Aeronautics Board entered in a Board proceeding which relates to a proposed extension of the route of Pan American-Grace Airways, Inc. (Panagra).

Panagra was organized in 1929 under Delaware law by its present owners, Grace and Pan American Airways Corporation (Pan American), each of which then purchased,

and has at all times since then owned, 50% of Panagra's outstanding stock. The agreement between Grace and Pan American which led to the organization of Panagra is confirmed in a letter from Grace to Pan American's predecessor, dated August 31, 1928, reading as follows: "This will confirm arrangement under which we will associate for the commencement of an airplane service in Peru with the view of ultimately inaugurating a through mail service from the Panama Canal to Valparaiso, Chile. A corporation will be formed under the laws of Delaware, with a capital stock of $50,000, of which $25,000 will be subscribed by yourselves and $25,000 by ourselves. This corporation will pay to [fol. 80] Huff-Daland Dusters, Inc. the sum of $15,000 for an assignment which will convey all of the rights of that company under its present Peruvian mail contract and concession. As soon as possible after the assignment has been completed, operations will be started by this company in Peru and every effort will be made to put the business there on a paying basis. We will in the meantime cooperate with you in studying the costs of operation on the route from the Panama Canal to Valparaiso and also the advisability of requesting the United States Post Office Department to advertise for a mail contract on such route and the terms of such advertisement. If you determine that it is advisable to bid on a contract for carrying the mails between the Panama Canal and Valparaiso, the Delaware corporation above referred to will be used in such service either by an increase in its capital stock to an amount sufficient to operate on the whole route or as a subsidiary operating in Peru. In either event, our subscriptions to the stock of the Delaware Company shall be credited at their full amount in the capital setup of the corporation operating the through service. We shall also have a reasonable time after a study of the estimated costs of such operation to determine what interest, if any, we will take in the company making the bid in addition to our initial investment of $25,000, such interest not to exceed, however, more than fifty percent of the total capitalization. You will have charge of the operation of the service from the Canal to Valparaiso and our houses on the West Coast of South America will be the agents of the company on a reasonable compensation basis, such agency to continue during the life of transportation contracts undertaken by the company. The details of carrying out the above must, of course, be worked out as

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we go along. We believe, however, that we have stated broadly the basis of our understanding."

[fol. 81] Shortly after its incorporation, Panagra secured a mail contract with the Postmaster General for the transportation of mail between the Canal Zone and Buenos Aires, Argentina, via various points on the west coast of South America. Operations under the contract were commenced in May 1929, between the Canal Zone and Mollendo, Peru, and were extended to Buenos Aires in October 1929. Since that date, Panagra has transported persons, property, and mail on its entire route between the Canal Zone and Buenos Aires. From time to time additional points and local services have been added to the route, so that at the present time its system comprises approximately 8,800 route miles. Its original certificate of convenience and necessity was issued by the Civil Aeronautics Board in 1938 under the "grandfather" clause, § 401 (e), of the Civil Aeronautics Act; its route has since then been extended by several amendments of its certificate.

In the opinion filed by the Board on May 24, 1944 in the present proceeding, it stated the following facts:

> "Pan American Airways, Inc., a wholly-owned subsidiary of Pan American, has operated international air transportation services since 1927. Since November 1931, it has operated an air transportation service between Miami, Florida, and Buenos Aires by way of points in the Caribbean and on the east coast of South America. In addition to that service, and others, Pan American Airways, Inc., has operated services between Miami and the Canal Zone and between Brownsville, Texas, and the Canal Zone, making connections at the Canal Zone with the services of Panagra.
>
> "The route between Miami and Buenos Aires via the Canal Zone and Panagra's west coast route is shorter than the route of Pan American Airways, Inc., between Miami and Buenos Aires via east coast points and the [fol. 82] so-called Brazilian cut-off. At no time has Panagra operated regular air transportation service north of the Canal Zone. Although traffic between the United States and points on the west coast of South America and Buenos Aires constitutes a large and important part of Panagra's total business, this traffic has been carried between the United States and the Canal Zone by other carriers, largely by Pan American

Airways, Inc., and at that point delivered to or received from Panagra for onward transportation. Most of the business interchanged by Pan American and Panagra at the Canal Zone is carried over Pan American's Miami-Canal Zone route, and originated in or is destined to the eastern seaboard of the United States. Other important contributions to Panagra's traffic flow are made to or from the Canal Zone through the Brownsville gateway served by Pan American's subsidiary, Compania Mexicana, S. A. Some traffic originating on or destined for the north coast of South America is also interchanged with Panagra at the Canal Zone. In addition, Pan American Airways, Inc., has recently been authorized to serve New Orleans, and New Orleans-Canal Zone service via Central America will enable traffic to be interchanged with Panagra at the Canal Zone * * * Since its incorporation * * * Panagra's commercial operations at all times have been confined to the transportation of passengers, cargo, and mail between the Canal Zone and points in South America. While a large proportion of its total traffic has consisted of traffic flowing between the United States and South America, that traffic has been moved north of the Canal Zone by other carriers."

For many years Grace has sought to have Panagra apply to the Board for an extension of its route from the Canal [fol. 83] Zone to the United States; but Pan American, through its 50% voting power, has consistently prevented Panagra from making an application for such an extension. Pan American asserted that the letter-agreement of August 31, 1928, did not contemplate such a development. The minutes of a meeting of Pan American's board of directors held December 28, 1938, contain the following: "It was the sense of the meeting that it would not be in the interest of our stockholders for our directors to authorize an application by Pan American-Grace Airways, Inc., to extend north of Cristobal in competition with Pan American Airways, Inc."

On February 14, 1939, Grace and Pan American made the following agreement:

"1. One of the Grace directors of Panagra (who shall also be a director of Grace) will be elected Presi-

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dent of Panagra and placed in responsible charge of the management of the company. If at any time the Company's affairs are not being conducted to Pan American's reasonable satisfaction, then the President will resign. 2. Pan American will inaugurate on or before April 1, 1939, a second direct trip between Miami and Cristobal, and will maintain an adequate direct connecting service between Miami, or some other United States port agreed upon, and Cristobal, connecting with Panagra's through mail schedules. If at any time Pan American shall not comply with the foregoing, then Pan American will cause its directors on the Board of Panagra to take such action as will permit Panagra's applying to the C. A. A. for a certificate to operate this connecting service, provided that, irrespective of any determination made as provided in paragraph 4, Pan American shall not be in any way precluded from maintaining before the C. A. A. that its service is satisfac-
[fol. 84] tory and should be continued and that no other service is required in the public interest. With the exception of the second direct trip between Miami and Cristobal above refered to, Pan American shall not be obligated to operate any schedules and services not designated by the Post Office Department as mail schedules but will use their best efforts to have designated as mail schedules any additional trips required to make connection with any increase in Panagra's through mail schedules. 3. It is agreeable to the parties that Pan American-Grace shall continue to utilize the respective services of Grace and Pan American and pay service fees in the same proportion as presently allowed, provided that the services to be rendered by the respective parties are satisfactory to Pan American-Grace. 4. Any disputes arising under this general plan and every phase thereof including, without limiting the generality of the foregoing, determination of 'Pan American's reasonable satisfaction' referred to in paragraph 1 above and of 'adequate direct connecting service' referred to in paragraph 2 above, which cannot be settled by the Board of Panagra, shall be determined by Messrs. D. S. Iglehart and C. V. Whitney. If Mr. Iglehart or Mr. Whitney shall be unable to act, or unable to agree in connection with any matter arising under the foregoing paragraphs, then, unless

otherwise agreed between Grace and Pan American, such matter shall be determined by arbitration by an arbitrator or arbitrators appointed by Messrs. Iglehart and Whitney, or failing such appointment, by three arbitrators, one appointed by Grace, one by Pan American, and a third by these two, and the party adjudged [fol. 85] in default shall, at the discretion of the Arbitrator, be given reasonable time to correct the default as the Arbitrator may fix. 5. This agreement shall continue to February 1, 1944, and thereafter until cancelled by Pan American or Grace on six months' written notice."

A meeting of Pan American's directors held January 7, 1941, adopted the following resolution: "Resolved, that the Corporation, as owner of half of the stock of Pan American-Grace Airways, Inc., should decline to acquiesce in the filing by Pan American-Grace Airways, Inc., of an application for a certificate of convenience and necessity between the Canal Zone and New Orleans, Louisiana, and that the representatives of the Corporation upon the Board of Directors of Pan American-Grace Airways, Inc., should not attend the meeting of such Board of Directors called for the afternoon of January 14, 1941, to act upon such proposal, or any adjournment thereof, and, except upon further instructions from the Executive Committee or the Board of Directors, should not attend any other meeting of the Board of Directors of Pan American-Grace Airways, Inc., at which action is to be taken upon the subject matter above-described." At a meeting of Pan American's directors held on July 1, 1941, this action was reaffirmed on the ground that it "would not be in the interest of" Pan American or Panagra "or in the public interest."

The Civil Aeronautics Board, in its opinion of May 24, 1944 in the present proceedings (known as Board's Docket No. 779) said:

"On December 16, 1941, Grace filed a petition and complaint, Docket No. 707, requesting the Board to institute a proceeding pursuant to section 401 (h) of [fol. 86] the Act to alter, amend, and modify Panagra's certificate of public convenience and necessity so as to make the northern terminal of its route a point in the United States such as Miami or Tampa, Florida, or

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New Orleans, Louisiana. On April 29, 1942, Grace filed a second complaint, Docket No. 744, requesting the Board to require Pan American Airways Corporation pursuant to section 411 of the Act and sections 7 and 11 of the Clayton Act, to cease and desist from certain matters alleged by Grace to be in violation of those sections, and to divest itself of its ownership of the stock of Panagra to the extent necessary to divest itself of its present negative control of Panagra; and also renewing its request in Docket No. 707. No formal steps were taken by the Board in connection with the Grace petitions in Dockets Nos. 707 and 744 until September 1942 • • • However, the Board did explore the possibility of working out a voluntary settlement of the controversy between Pan American and Grace. Numerous conferences were held by the Board with both parties. Finally, the Board suggested that the parties enter into an agreement under which sufficient shares of the two stockholders would be transferred to an independent public voting trustee or trustees to permit the election to the Panagra Board of an independent public director or directors, or under which such an independent public director or directors might be otherwise appointed, who would be able to break the deadlock resulting from the equal division of the ownership of Panagra stock between Pan American and Grace. After it became apparent that no satisfactory voluntary arrangements could be mutually agreed upon by the parties and that all efforts to mediate the differences between them would be unsuccessful, the Board, on September 10, 1942, issued its order [fol. 87] • • • as amended by its order of October 22, 1942 • • • instituting the present proceeding • • •"[1]

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[1] The Board's effort to work out "a voluntary settlement of the controversy between Pan American and Grace" apparently continued even after these orders for hearing issued. For on October 28, 1942, Grace wrote the Board as follows: "We accept your suggestion in principle and, for the duration of the war, we agree to the immediate addition to Panagra's Board of an odd director (satisfactory to both stockholders) who might also serve as Chairman of the Board, with the understanding that this individual will be

Grace's petition, filed April 29, 1942 (Docket No. 744) consisted of a letter to the Board with an accompanying "Statement of Facts." The Board's Regulations provided: "Complaints may be made to the Board informally by letter * * *"

The order of September 10, 1942, entitled Docket 779, read as follows:

> "It appearing to the Board:
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> "1. That W. R. Grace & Co. (hereinafter called "Grace") and Pan American Airways Corporation each own 50 per cent of the stock of Pan American-[fol. 88] Grace Airways, Inc. (hereinafter called "Panagra"); and
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> "2. That Grace has filed with the Board a petition (Docket No. 707) for the alteration, amendment and modification of the certificate of public convenience and necessity of Panagra pursuant to section 401(h) of the Civil Aeronautics Act of 1938, as amended, so as to name a point within the United States as a terminal of Panagra's route; and
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> "3. That Grace alleges in said petition that Panagra's primary function is to provide air transporta-

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free to decide independently and without limitation, and on the basis of Panagra's being an independent entity, all matters involving Panagra's operations without regard to which the Pan American and Grace directors may be unable to agree. Such an arrangement accomplishes the same purpose as establishing a voting trust along the lines you suggested, while being less complicated and more easily put into effect. For reasons pointed out this morning, the suggestion of Pan American that there be an odd director appointed, who would only have 'power to break any deadlock on any questions arising in connection with operations of the company that fall within the scope of the dedication of capital made by the two stockholders' begs the entire question. Grace and Pan American are not in agreement as to what is the proper scope of the company's operations, and fourteen years' experience has shown that such deadlocks as arise almost invariably revolve around this very issue which Pan American wishes to exclude from the jurisdiction of the odd director."

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tion over its route for passengers, property, and mail between the United States and the west coast of South America; that at the present time Panagra is dependent on Pan American Airways, Inc. (hereinafter called "Pan American"), a wholly owned subsidiary of Pan American Airways Corporation, for connecting service between the United States and the Canal Zone; and that such connecting service has been unsatisfactory for the reason alleged in said petition; and

"4. That unsatisfactory connecting service, if such exists, may result in air transportation service to the public between the United States and the west coast of South America which is inadequate and deficient as to both quality and quantity, and may also result in retarding the proper and sound development of air transportation service between the United States and the west coast of South America; and that such results would not be in the public convenience or necessity or in the public interest as defined in section 2 of said Civil Aeronautics Act of 1938 as amended; and

[fol. 89] "5. That Pan American is the only air carrier authorized at the present time to engage in air transportation between the United States and South America, and that an additional service by another air carrier may provide competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense; and

"6. That Grace in its petition, Docket No. 744, alleges that Panagra, because of the opposition of its 50 per cent stockholder, Pan American Airways Corporation, is not authorized by its Board of Directors and stockholders to make application to this Board for the amendment of its certificate of convenience and necessity so as to provide for said terminal in the United States; and

"The Board finding that its action herein is necessary in order to carry out the provisions of, and to exercise and perform its duties under the Civil Aero-

nautics Act of 1938, as amended, and acting upon its own initiative and pursuant to the powers and duties vested in it under Titles II, IV and X of the Civil Aeronautics Act of 1938, as amended, particularly section 401(h) thereof;

"It Is Ordered:

"1. That a proceeding is hereby instituted by the Board to determine whether the public convenience and necessity require that the certificate of public convenience and necessity of Panagra should be altered, [fol. 90] amended and modified to authorize and require (a) that Panagra's route terminate in the United States at Miami or Tampa, Florida; New Orleans, Louisiana; Brownsville or El Paso, Texas; Los Angeles, California; or at two or more of said points; and (b) in the event a terminal or terminals in the United States are authorized and required pursuant to this proceeding, that Panagra serve one or more intermediate points between the Canal Zone and said terminal or terminals in the United States; and

"2. That Panagra, Grace and Pan American are made parties to this proceeding; and

"3. That this proceeding be assigned for public hearing before an examiner of the Board at a time and place hereafter to be designated."

The amending order of October 22, 1942, provided in part that "paragraph 1(a) of the aforesaid order of the Board dated September 10, 1942 (Order Serial No. 1928) be and it is amended by striking out the words 'Miami or Tampa, Florida; New Orleans, Louisiana; Brownsville or El Paso, Texas; Los Angeles, California,' and inserting in lieu thereof the words 'Miami, Tampa or St. Petersburg, Florida * * *'."

Pan American filed a petition to intervene, which the Board granted. Pan American then filed an answer in which it stated that it was an answer to the petitions filed by Grace in Dockets Nos. 707 and 744. Pan American in this answer asked that the Board consider whether Grace, because of its interest in Panagra, was violating § 408.

Eastern Air Lines, Inc., was permitted to intervene. It asked the Board to consolidate the hearing with Eastern's [fol. 91] application (Docket No. 782) for a certificate to engage in transportation between the Canal Zone and divers

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points in the United States. Similar motions for consolidation were made by three other carriers. In its amending order of October 22, 1942, the Board said: "That all requests and motions for consolidation of other applications and dockets with this proceeding are hereby denied."

In pre-hearing conferences, Pan American asked that Grace be required to furnish exhibits bearing on its alleged violation of § 408. In a supporting memorandum, Pan American referred to "Grace's complaints in Dockets No. 707 and 744 which form the background of this proceeding * * *" In reply, Grace contended that the Board should not go into the question of Grace's violation of § 408 because the "scope of Docket No. 779 does not include the issues raised by Grace in Docket No. 744 with respect to Section 411 * * * If the Board wishes to pursue this subject [questions of corporate control and management] further, it should grant the petition of Pan American for an investigation under Section 415 of the Civil Aeronautics Act, just as it should institute proceedings under Section 411 as requested by Grace in Docket No. 744 if it wishes to pursue all the questions raised by Grace in Docket No. 744. These, we submit, should, in any event, be separate proceedings from the instant one, so as not to delay or obstruct the prompt disposition of this proceeding. Grace does not believe that the Board should go into those issues here or the extensive and complicated issues as to the applicability of Section 408 when it is abundantly apparent that neither Section 408, 411 or 415 is relevant to the instant proceeding." The Examiners ruled that the information requested by Pan American and Grace be furnished.

[fol. 92] The Department of Justice, which was permitted to intervene, urged, early in the hearing, that the issues under the "complaint" as to monopoly should be resolved before the Board heard evidence as to amendment of Panagra's certificate,[18] but the Examiners did not adopt that suggestion.

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[18] It also urged that the issue of Panagra's fitness, ability and willingness to conduct the proposed new operations was intertwined with, and could not be decided without consideration of, the issue arising from the dual ownership of Panagra.

In the Report of the Prehearing Conference, dated December 31, 1942, the Examiners said, "The Examiners make it clear that this proceeding would be restricted to a consideration of the issues arising under §401 in connection with the inauguration of additional Air service between the Canal Zone and Florida, and that they would not allow the introduction of testimony and exhibits that are *solely* [1b] related to the Board's investigation in Docket No. 744." The Examiners apparently agreed with a statement of the Board's Public Counsel that some of the factual background relevant to the investigation in Docket No. 744 should be considered in the Docket No. 779 proceeding, that "the family difficulties within • • • Panagra are pertinent to the question of the carrier to be selected; • • • [to the question] whether Panagra is fit and able to extend its present route into the United States."

At the hearing, counsel for Pan American offered in evidence Grace's petition filed April 29, 1942 (Docket No. 744). Grace objected, and one of the Examiners, after noting that the proceeding did "not include Docket No. 744," said, "Of course, this is a matter on file with the Board to which it may make reference, and I see no reason for incorporating it in this case. It is a public document, [fol. 93] a formal document before the Board, in which a certain position has been taken and if argument is necessary and if it is desirable to argue on it, it seems to me you can argue from the other document as well as incorporating it in this record • • • I am not quarreling as to the admissibility. I am merely saying that the Board can take cognizance of it just as well on its file as it can • • •" Counsel for Pan American interrupted to say, "If your ruling is that we can refer to it in brief and argument—," to which the Examiner replied, "That is the ruling."

During the hearing, when counsel for Grace objected to a certain line of inquiry, the Examiner said:

> "Examiner Brown: Mr. Cahill, we have got to make it clear that we have got a very wide investigation. In the exhibits that have been submitted not only by Pan American but also by Grace and by Panagra, we have gone into details concerning the organization and development of this company back from the days of its early inception. We have gone into matters of

[1b] Emphasis added.

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the minutest detail, concerning the operations and the conflict of interests which have arisen, and we have gotten into questions concerning control under Section 408 of the Act, and while I agree that this investigation was for the purpose of determining whether or not Panagra should be extended from the Canal Zone to the United States, those issues are in here and we might just as well face it, and that is what we are going to have to hear." And the Board's counsel remarked: "* * * we are getting so far away from our convenience and necessity * * * that we don't even recognize [a question of convenience and necessity] when we see it."

[fol. 94] At any rate, before the hearing was ended, many pages of evidence relevant to the issues raised in Grace's petitions were received in addition to material relevant to Pan American's countercharges.[1c]

[1c] Thus evidence was received bearing on Grace's efforts for, and Pan American's against, the extension of Panagra, up to the time of the hearing; of the alleged failure of the Pan American directors of Panagra to cooperate with efforts of the Grace directors to extend Panagra's route, and the alleged attempts by Pan American to exact payment from Panagra before giving consent to proposed extensions. The record also contains testimony in regard to the opposition of Pan American to the extension of Panagra into areas where it would compete with Pan American subsidiaries and with Scadta, in which Pan American had a substantial interest. The differences between Grace and Pan American directors as to types of equipment, radio facilities and publicity techniques were all aired at the hearing, as were Grace's charges that Pan American had used unfair competitive practices in its failure to furnish adequate connecting service to Panagra. There is also evidence in regard to Pan American's alleged efforts to divert Post Office patronage from Panagra to Pan American. In addition there is evidence bearing on Pan American's charges that Grace's interest in the Grace Line, and representation of Panagra in South America by the agencies of Grace, were detrimental to Panagra.

This summation is not exhaustive, but merely illustrative of the material which appears in the record in Docket No. 779.

At the beginning of the hearing, Pan American had moved to dismiss the proceeding for want of jurisdiction in the Board. The Board denied this motion without prejudice to its renewal at the close of the hearing. When the hearing before the Board's Examiners closed, Pan American renewed its motion, asking that it be set down for argument before the Board heard argument on the merits. The Board granted this request. Grace then filed a countermotion asking deferment of argument on the jurisdictional issue until final argument on the merits. The Board entered an order, dated December 17, 1943, denying the crossmotion. After hearing argument on the motion to dismiss, the Board on May 24, 1944, entered an order, accompanied by an opinion, dismissing the proceeding for want of jurisdiction.

[fol. 95] In its opinion of May 24, 1944, the Board said, *inter alia*:

> "Since its incorporation in 1929 Panagra's commercial operations at all times have been confined to the transportation of passengers, cargo, and mail between the Canal Zone and points in South America. While a large proportion of its total traffic has consisted of traffic flowing between the United States and South America, that traffic has been moved north of the Canal Zone by other carriers. The extension of Panagra's system referred to in the order instituting the present proceeding would give the carrier direct access to one or more of the major gateways for through traffic between the United States and Latin America. The extension would permit it to connect directly with the domestic air transportation system of the United States, without the necessity of relying upon the connecting services of Pan American and other carriers operating in the foreign field for access to traffic flowing to and from the continental United States. The extension would increase the route mileage of Panagra approximately 1200 miles, or about 14 per cent of its existing mileage. It is estimated that the extension initially would require an additional capital investment on the part of Panagra of around $800,000 which compares with Panagra's gross assets at the end of 1942 of $10,700,000 and its net worth, exclusive of goodwill, of over $3,000,000.

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"In the light of the conditions surrounding the extension here involved we conclude that the requiring of the extension would not be within the power granted the Board by section 401(h) to 'alter, amend, [or] modify' Panagra's certificate. The length of the mile-[fol. 96] age of the new service and the amount of additional investment required to operate it have been factors in reaching this conclusion. However, the principal consideration which influences us is the fact that to extend the Panagra system from the Canal Zone to a point in Florida would constitute a basic transformation of the character of the carrier. Panagra, now a connecting carrier as to through traffic between the United States and South America, would be made a carrier directly serving that traffic—and serving it moreover in competition with an affiliated company. There is a fundamental difference between the position of a carrier whose routes stop so far short of the continental United States as those of Panagra and which depends upon connecting carriers for access to traffic to and from that area, and a carrier which has direct access to the continental United States over its own system. It does not seem reasonable to believe that Congress contemplated that such a change in the character of a carrier's system should be compelled by Government order. We find, therefore, that the extension of Panagra's route from the Canal Zone to the United States would not be an alteration, amendment, or modification of its certificate within the meaning of section 401(h) of the Act in the sense that the Board could compel such an extension in the absence of an application from Panagra.

"Regardless of which of the co-owners of Panagra is at fault, the very fact that controversy of this kind has developed indicates that an unhealthy condition exists in the internal affairs of the company. A decision by the Board, after consideration on the merits, of the question of whether or not Panagra's routes should be extended to some point or points [fol. 97] in the continental limits of the United States would remedy one particular controversy between the co-owners; but it would not solve the basic difficulties

> of the Panagra joint ownership. This is an inherently bad situation. Deadlock between the two interests equally represented in the ownership of the company is always possible, and certain to occur from time to time, especially in view of the special interests and the other activities of the two co-owners. We have sought remedy under the Civil Aeronautics Act, but after having the facts presented in extensive public hearings, we must conclude that the Act does not give the Board the power to take the action contemplated by this proceeding."

By an order of August 5, 1944, the Board denied Grace's petition for reargument and reconsideration in which Grace (without referring to Section 411) had requested the Board to vacate its dismissal order and remand the case to the Examiners for a report on the facts relating to the issue of jurisdiction and to the merits. Grace then petitioned this Court to review the orders of December 17, 1943, of May 24, 1944, and of August 5, 1944. Pan American, and Eastern Air Lines, Inc., moved to dismiss that petition. In its brief filed in this court in support of its motion to dismiss, Pan American said that "the proceeding in Docket 779 * * * was instituted not only under Section 401(h), but also under Titles II and X of the Act, which supply the Board with investigatory authority (Sections 205(a) and 1002(b))." Eastern also, in its briefs in this court, referred to the action of the Board as in part under §1002(b).

In its petition to review the Board's order, Grace alleged, *inter alia*: "The Board erred in taking into consideration as bearing on its jurisdiction under §401(h) of the Civil Aeronautics Act, any controversy between the co-owners [fol. 98] of Panagra." The petition did not refer to the Board's failure to take action under §411, but it concluded with a prayer "that petitioner have such and other further relief as to the Court may seem just and proper in the premises."

Sections of the Act cited on this appeal read as follows:

Section 2. (Declaration of Policy) In the exercise of its powers and duties * * * the Board shall consider the following among other things, as being in the public

interest, and in accord with public convenience and necessity—(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense; * * * (c) The promotion of adequate, economical, and efficient service by carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; (d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense * * *.

Section 411. The Board may, upon its own initiative or upon complaint by any air carrier or foreign air-carrier, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier or foreign air carrier has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation. If the Board shall find, after notice and hearing, that such air carrier or foreign air carrier is engaged in such unfair competition, it shall order such air carrier or foreign air carrier to cease and desist f-om such practices or methods of competition.

[fol. 99] Section 1002(a). Any person may file with the Board a complaint in writing with respect to anything done or omitted to be done by any person in contravention of any provision of this chapter, or of any requirement established pursuant thereto. If the person complained against shall not satisfy the complaint and there shall appear to be any reasonable ground for investigating the complaint, it shall be the duty of the Board to investigate the matters complained of. Whenever the Board is of the opinion that any complaint does not state facts which warrant an investigation or action on its part, it may dismiss such complaint without hearing * * * (c) If the Board finds, after notice and hearing, in any investigation instituted upon complaint or upon its own initiative, that any person has failed to comply with any provision of this chapter or any requirement established pursuant

thereto, the Board shall issue an appropriate order to compel such person to comply therewith.

Section 401. (Certificate of public convenience and necessity) * * * (d)(1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this chapter and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied. (2) In the case of an application for a certificate to engage in temporary air transportation, the Board may issue a certificate authorizing the whole or any part thereof such limited periods as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform such transportation and to conform to the [fol. 100] provisions of this chapter and the rules, regulations, and requirements of the Board hereunder * * * (h) The Board, upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require or may revoke any such certificate, in whole or in part, for intential failure to comply with any provision of this subchapter or any order, rule or regulation issued hereunder or any term, condition, or limitation of such certificate: *Provided*, That no such certificate shall be revoked unless the holder therof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of a certificate.

FRANK, *Circuit Judge:*

1. It has been suggested that the Board should have considered and decided the issue of the violation of Section 411 by treating the proceeding as it involved Grace's

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petition No. 744.[2] But the scope of this proceeding (No. 779) is to be measured, we think, by the directory part of the Board's order of September 10, 1942; not by its recitals, save as these may be necessary to throw light upon the rest; nor by what the parties said in their argu- [fol. 101] ments and briefs, or in the course of the hearings. Of course, we do not mean that the order finally fixed the issues; but we think it did so in the absence of some amendment plainly intended to change them. Turning then to the order, the proceeding was "to determine whether the public convenience and necessity require that the certificate of public convenience and necessity of Panagra should be altered." The proceeding was therefore under §401(h); and such we think it remained throughout, for the recital about No. 744 served no further purpose than to allege that the Pan American Company was preventing Panagra from itself making the application. It would be too much to say that the Board treated the proceeding as a continuation of No. 707. But it came nearly to the same thing after Grace & Company had been cited in, and Pan American had been made a party by intervention, for No. 707 had also been addressed to the same issue of "public convenience and necessity." The Board never carried through this purpose: eventually it felt itself foreclosed, because it did not treat Panagra as an applicant for the extension, and that limited the inquiry to whether the facts justified forcing such an extension upon an unwilling carrier. Once the Board had decided that they did not, it became impossible to go on with the original issue of public convenience and necessity; and the proceeding necessarily came to an abortive end. We will assume for argument that the Board was right in its holdings, if Panagra was to be regarded as an unwilling carrier, and if therefore the only issue was whether the proposed extension could be forced upon it. That was indeed an issue with which the Board was peculiarly qualified to deal, and the new competition which the extension would invite—to say nothing of its expense—may well have put the extension out- [fol. 102] side those additional burdens which a licensee impliedly accepts as part of the control to which his rights

[2] In an appendix to this opinion we have stated, in some detail, the contentions in support of that position.

are in any event subject. Unless therefore it was within the power of the Board to inquire into the right of Grace & Company to speak for Panagra, and by doing so to make the application a voluntary one, it may well be that the order was right. If on the other hand the Board had power to make that inquiry, it could have pressed the proceeding to a conclusion along the lines on which it had been initiated, and we think that this is what it should have done.

In *Pittsburgh etc. R. R. Co.* v. *United States,* 281 U. S. 479, the Supreme Court held that, in reviewing an order of the Interstate Commerce Commission, the court might not examine whether the majority shareholders of a railroad, a party to the proceeding, were abusing their power in taking the position in the proceeding which they did. Such an inquiry was to be reserved for a separate suit, and could not be interjected into the controversy before the Commission. In spite of some differences which we will point out, we might feel that decision conclusive here, were it not for the decision in *American Power & Light Co.* v. *Securities & Exchange Commission,* 325 U. S. 385; particularly that part of it which dealt with Okin's appeal. Okin, the court said, had no interest in the proceeding before the Commission different from any other shareholder's; he could speak only for his class and his claim was therefore necessarily derivative. Since he was allowed to appeal, we can see no escape from concluding that he had a standing to assert a right of the Electric Bond & Share Company.[3] If he had not, he had no standing at all

[3] The Supreme Court, after what appear to be conflicting decisions as to whether a person with sufficient interest to become a party to a proceeding before an administrative agency has enough of an interest to maintain court review of that agency's order entered in that proceeding, recently stated that the question is now open and undecided. See *Alton R. Co.* v. *United States,* 315 U. S. 15, 19; *Chicago Junction Case,* 264 U. S. 258, 267; *Sprunt* v. *United States,* 281 U. S. 249, 255; *Pittsburgh & W. Va. Ry. Co.* v. *United States,* 281 U. S. 479, 486-488; cf. *Associated Industries* v. *Ickes,* 134 F. (2d) 694, 711-712 and note 57 (CCA 2).

In other words, the interest necessary to maintain court review has been regarded as at least as great as, if not

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[fol. 103] —unlike the American Power & Light Company, which had an individual grievance. His power so to speak for the company depended upon his allegation that the action of the directors was actuated by "illegality and fraud" (p. 392) which made futile any recourse to the management. In accord with this, it seems to us that, if Grace & Company could prove that the opposition of Pan American (the parent company, for we disregard the subsidiary) to Panagra's applying for an extension was due to "illegality and fraud," it would follow that this proceeding should be regarded as a voluntary application for the extension; and then it would be open to the Board to decide the issue of public convenience and necessity.[4] Certainly there is everything to be said in favor of such a course, if it is possible. To await the outcome of a suit brought in a court to direct Panagra to apply for the extension, would be at best dilatory and vexatious, and there are other and more important reasons against it.

The issues, upon which such a shareholder's suit would depend, would be whether the Pan American Company was opposing the extension because it was pursuing its [fol. 104] own advantage to the prejudice of the joint interest ("fraud"), and because it was engaging in some unfair trade practice ("illegality"). Both those issues demand the same specialized acquaintance with commercial aviation and its ramifications as a decision upon the public convenience and necessity of the extension itself. No court, state or federal, would have that acquaintance; by hypothesis the Board does have it, and the Board alone. To remove the decision from the Board, not only duplicates the time and labor, but subjects the result to the final determination of a relatively incompetent tribunal; for,

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greater than, that necessary to participate in proceedings before the agency. Consequently, one who, like Okin (and therefore like Grace), has the status to initiate judicial review would seem clearly to be entitled to initiate an administrative proceeding.

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[4] The Board tells us that in other cases it has treated consents by carriers, filed in s. 401(h) proceedings, as voluntary petitions for extensions under § 401 (d). We think that a correct conclusion.

if the court should decide that the Pan American Company's refusal was neither oppressive, nor unlawful, there would be an end of this proceeding, and of No. 707. It might, however, still be possible for the Board under § 411 to order the Pan American Company to "cease and desist" from any unfair trade practices in which the Board—differing from the Court—might think it engaged; but surely such a conflict between court and Board would be to the last degree undesirable, regardless of the possible insufficiency of the available remedies. For these reasons it seems to us that in this proceeding the Board had power to determine, as between Grace & Company and the Pan American Company, which should speak for Panagra. Needless to say, we suggest nothing as to the proper outcome of that inquiry.

There remains only the question whether the Board would be justified in refusing to introduce that controversy into this proceeding, and in reserving it for either No. 707 or No. 744. In the first place it does not appear that, if the Board had believed the power to exist, it would have refused to press the proceeding to a conclusion; but; even if it would have refused, we should not concur. True, the Board must have very wide latitude in deciding in [fol. 105] what order to take up the issues in any litigation (*Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134); but *Ashbacker Radio Corporation* v. *Federal Communications Commission*, 326 U. S. ——, decided that there may be practical reasons for not determining part of an indivisible controversy in advance, even though the first decision will not be conclusive. In the case at bar more than four thousand pages of evidence had been taken and the record was complete, before the Board finally decided the motion which had been pending from the outset. It may prove possible in a separate hearing later to be called in No. 707 to introduce the evidence so taken; but we can see no conceivable reason, except a defect of power, for adopting so futile and dilatory a course.[5] *Arguendo*,

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[5] More than four years have elapsed since Grace, on December 16, 1941, filed its petition (No. 707) but the Board has not yet acted thereon. It is not impossible that should the Board much longer delay, and then decide that the extension should be granted to Panagra, its action might be

one might even agree that it might have been convenient *in limine* to decide whether the extension could be forced upon Panagra *in invitum*, reserving the trial of any other issues. But to frustrate the whole undertaking when it lay ripe for final conclusion was, we think, beyond even that generous latitude which must be accorded to the Board's [fol. 106] discretion. Hence we conclude that the Board should be directed to decide whether Panagra should be treated as applying for the extension; and if that turns out to be true, whether the public convenience and neces-

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frustrated by the intervening grants of licenses to other carriers.

Indeed, in the briefs of the parties we are told the following facts which do not appear of record: Since the date when the Board dismissed the present proceedings, other carriers have applied for certificates covering routes between the Canal Zone and the United States, and the Board has held a consolidated hearing on such applications known as the Latin American Proceeding (Docket No. 525 *et al.*). In that consolidated hearing, the Board's Examiners and its Public Counsel have reported that, while the public interest would best be served by the extension of Panagra to a United States terminal, they considered that recommendation foreclosed by the Board's decision in the proceedings now before us, and consequently they recommended that routes between the United States and the Canal Zone be awarded to other carriers.

The Public Counsel, in his brief before the Examiners in Docket No. 525, said: "Probably Panagra carries this traffic as far on its own system as the distance between Balboa and New York or Miami. This fact, in addition to the fact that Panagra has carried this traffic for a number of years, would seem to entitle Panagra to a certificate for this route. Such an authorization would also provide the greatest public convenience. However, as is well known, the Panagra directors representing Pan American have refused to approve an application for such an extentsion. Thus, Pan American, through its 50 percent ownership, has prevented the countries on the west coast of South American from realizing the convenience of a one-carrier service from a United States carrier. Since we are prevented by this action of Pan American from recommending the best possible service, we must turn to the next best solution."

sity require the extension to be granted. These two issues being intricately intermeshed, as we have said, we do not mean that they should be decided *seriatim*. Logically, indeed, they do arise in the order we mention, but the very purpose of joining them would be in part defeated if both were not decided together.

Whether the agreements of August 31, 1928 and February 14, 1939, violated the anti-trust laws will not affect the issues. For, even if those agreements were legal, it does not follow that Pan American is not using its voting power in Panagra illegally. And even if the agreements, when made, were in violation of the anti-trust laws, Grace would not be thereby estopped from asking to be relieved of them; a party to a contract violative of a statute cannot be estopped from repudiating it when such repudiation will further the very public interest which the statute was designed to protect.[6]

Remanded.

[fol. 107] APPENDIX

We think it well to set forth the following arguments which we have not found it necessary to consider but which have been advanced to support a not altogether dissimilar conclusion.

It is urged that the Board, when it issued its hearing order of September 10, 1942, had in mind Section 411, which is to be read in the light of Section 2(a), (c) and (d). For, it is suggested, from the face of that order and from the explicit statements in the Board's opinion of May 24, 1944, describing the facts leading up to that order, the following appears: Grace, on December 16, 1941, filed a petition (called Docket No. 707) asking the Board to amend Panagra's certificate to extend its route from the Canal Zone to the United States. On April 29, 1942, Grace filed what the Board describes as a complaint (called Docket No. 744), pursuant to § 411, asking the Board to require Pan American to cease and desist from actions (alleged by Grace to be in violation of § 411), and ordering Pan

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[6] See, e.g., *Cleveland C. C. & St. L. Ry. Co.* v. *Hirsch*, 204 F. 849, 858, 859 (C. C. A. 6); *Scott Paper Co.* v. *Marculus Mfg. Co.*, U. S. (Nov. 13, 1945); 22 C. J. S. 1019.

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American to divest itself of its ownership of Panagra stock to the extent necessary to rid itself of its "negative control" of Panagra; in this complaint Grace renewed the request made in its previous petition (Docket No. 707). As the Board stated in its opinion, "no formal steps were taken by the Board in connection with the Grace petitions in Dockets No. 707 and 744 until September 1942." Then —according to the Board's own opinion—on September 10, 1942, the Board took such "formal steps in connection with the Grace petitions" by issuing its order (in what it called Docket No. 779) directing a hearing. The recitals of that order, it is said, make it plain that, although the Board stated that it was "acting upon its own initiative," the Board called that hearing because of the Grace peti- [fol. 108] tions. Nor, it is argued, was § 411 disregarded, for the order recited that the Board was proceeding "pursuant to the powers and duties vested in it under Titles II, IV and X of the Civil Aeronautics Act of 1938, as amended, and particularly § 401(h) thereof," and Title II of the Act includes § 411. (Pan American, in one of its briefs in this court, contends that the proceeding "was instituted not only under § 401(h), but also under Titles II and X * * *") Also prominent in the recitals of the Board's order are the statements that "unsatisfactory connecting service, if such exists, may result in air transportation service to the public between the United States and the west coast of South America which is inadequate and deficient as to both quality and quantity, and may also result in retarding the proper and sound development of air transportation service between the United States and the west coast of South America; and that such results would not be in the public convenience and necessity or in the public interest as defined in section 2 of said Civil Aeronautics Act of 1938, as amended; and that Pan American is the only air carrier authorized at the present time to engage in air transportation between the United States and South America, and that an additional service by another air carrier may provide competition to the extent necessary to assure the sound development of an air transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense."

It is then suggested that, just as in *Ashbacker Radio Corporation* v. *Federal Communications Commission*, 326

U. S. ——, so here the Board's decision as to its powers under § 401(h) without a simultaneous decision as to the alleged violation of § 411, may be seriously detrimental to the paramount public interest; and that therefore we must go behind the Board's present picture of the nature [fol. 109] of its proceeding in Docket No. 779 and remand for Board determination, in that proceeding, of the issues under § 411.

The Board argues that the report of its Examiners (pursuant to the Board's Regulation) resulting from the pre-hearing conferences, limited the scope of the hearing so as to preclude consideration of issues under § 411. Grace replies that in fact a vast amount of evidence pertinent to the issue under § 411 was received at the hearing, for it was recognized by everyone concerned that the relations between Pan American and Panagra affected both the issue of "public convenience and necessity" and the issue whether Panagra was "fit, willing, and able to perform" services involved in the proposed extension of its route. It is also said that the Board's Regulation as to the Examiners' Report on a pre-hearing conference, states that such report "shall control the subsequent course of the proceeding, but it may be reconsidered and modified at any time to prevent injustice"; the Board, it is suggested, should now be required to adapt the scope of the hearing to conform to the proof received, giving full opportunity to the parties to introduce further evidence, so far as necessary, relevant to the issue under s. 411.[7]

Pan American argues that it, as distinguished from its wholly-owned subsidiary, was not made a party to the hear-

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[7] It is suggested that that portion of the Board's amendatory order of October 22, 1942, denying "motions for consolidation of other applications and dockets with this proceeding" was ambiguous and that it may well have related not to Grace's petitions but to the motions of other air carriers to consolidate their applications for extensions with Docket No. 744; for, in April, 1942, the Board had announced that for the duration of the existing national emergency, no further action would be taken with respect to applications for authority to operate a new air transport unless special considerations of national interest were involved.

ing and therefore was not given adequate notice to justify an order affecting it under § 411. But, says Grace, Pan [fol. 110] American, on its own motion, was allowed to intervene and was active throughout the entire hearing.

Referring to § 1006, which provides that "no objection to an order of the Board shall be considered unless such objection shall have been urged before the Board," Pan American contends that the failure of the Board to proceed in Docket No. 799 under § 411 cannot be considered by us because Grace made no objection on that score before the Board. Grace replies that it objected to the Board's rejection of jurisdiction; and, since the Board's failure to act under § 411 involved a refusal by the Board to exercise its jurisdiction, Grace's objection was sufficient to raise that issue here, especially as Grace's right to maintain court review derives from the fact that it is vindicating the public interest, and this is not ordinary litigation between private persons.[8] In like manner Grace replies to the contention that it is estopped to raise any issue under § 411 because, before the Examiners, it took the position that the hearing did not extend to its complaint under that section, and because, in its petition in this court to review the Board's order of May 24, 1942, it has not objected to the Board's failure to act under § 411.

Grace asserts that the words "unfair methods of competition" in § 411 were taken from the Federal Trade Commission Act; that those words in that Act have been held to include conduct violative of the Sherman Act;[9] and that a corporation violates the Sherman Act if it uses its voting power in another corporation to prevent competition between the two corporations.[10]

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[8] It is also noted that Grace's petition for review contains a prayer for "such other relief as to the court may seem just and proper in the premises."

[9] *Federal Trade Commission* v. *Pacific States Paper Association*, 273 U. S. 52; *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U. S. 441; *Federal Trade Commission* v. *Keppel*, 291 U. S. 304, 310.

[10] *Bausch Machine Co.* v. *Aluminum Co.*, 72 F. (2d) 236, 239-240 (C. C. A. 2, cert. den. 293 U. S. 289).

[fol. 111] Pan American and the Board, however, argue that an order under § 411 may be directed only against an "air carrier," and that Pan American is not itself an air carrier, but merely a holding company completely owning Pan American Airways, Inc., which is an air carrier. *Per contra,* it is said that § 1(a) of the Act defines an "air carrier" to mean "any citizen of the United States who undertakes, whether directly or indirectly or by lease or any other arrangements, to engage in air transportation." It is further contended that a complaint under § 411 must be by an "air carrier" and that Grace is not such.

But it is answered that, as Grace charges that Pan American is illegally using its position in Panagra to prevent competition, Grace properly filed a derivative complaint, on Panagra's behalf, under § 411; and that, were such derivative action not possible, a carrier illegally utilizing control of another carrier corporation could, with resultant injury to the public interest, block the victimized carrier from filing a complaint with the Civil Aeronautics Board in the manner contemplated by § 411.

Answering the contention that, even when a proper complaint is filed under s. 411, the Board has an unreviewable discretion to decide whether it would be in the public interest to make such an investigation, it is said that here, by its own description of its action (in its September 10, 1942 order and its May 24, 1944 opinion), the Board has shown that it has already exercised that discretion, and that accordingly it could not arbitrarily abandon the hearing but should have continued it to find whether or not Pan American "is engaged in * * * unfair methods of competition," in which event the Board should have ordered Pan American to cease and desist.

It is also suggested that, in its hearing order, the Board said that it was acting, *inter alia,* under Title X of the Act, and that that Title includes § 1002. In a brief the Board [fol. 112] says that, if Grace's petition filed April 29, 1942 (Docket 744), may be considered in this proceeding, then "Section 1002 of the Act may have a limited bearing. If Grace should be held not to be an air carrier under the Civil Aeronautics Act, and hence without standing to file a complaint under § 411 of the Act, subsection (a) of § 1002, which grants in broader language the right to file complaints for violations of the provisions of the Act, might be relied

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upon as a basis for Grace's pleading." These provisions, it is urged, seem to have been substantially borrowed from 49 U. S. C. A. Sections 13(1) and 15, under which it has been held that the Interstate Commerce Commission must exercise its jurisdiction when a complaint is filed.[11]

[11] See, e. g., *I. C. C.* v. *Baird*, 194 U. S. 25, 39; *Louisville Cement Co.* v. *I. C. C.*, 246 U. S. 638, 642-643, 644-645; *I. C. C.* v. *Humboldt Steamship Co.*, 224 U. S. 474, 485.